

No. 12844

United States
Court of Appeals
for the Ninth Circuit.

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY, a Corporation,

Appellant,

vs.

H. V. CARTER CO., INC., a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

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PAUL J. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the Superior Court of the State of California,
in and for the City and County of San Francisco

Civil Action No. 362371

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY, a Corporation; GRAVELY MOTOR PLOW AND TRACTOR CO., INC., a Corporation; GRAVELY-PACIFIC, INC., a Corporation; FIRST DOE COMPANY, SECOND DOE COMPANY, and THIRD DOE COMPANY, Corporations,

Defendants.

COMPLAINT FOR DAMAGES (BREACH OF CONTRACT)

Comes now plaintiff and for cause of action against defendant and each of them alleges:

I.

Plaintiff is now and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and authorized to do, and doing business within the State of California, and having its principal place of business in the City and County of San Francisco.

II.

That defendant, Gravely Motor Plow and Cultivator Company, is a corporation organized under

the laws of the State of West Virginia and is now and has been during all of the times hereinafter mentioned doing business within the State of California; said company will hereinafter be referred to for the sake of convenience as "Gravely."

III.

That Gravely Motor Plow and Tractor Co. Inc., is a corporation organized under the laws of the State of West Virginia and has been doing business within the State of California since the time of its incorporation.

IV.

Gravely-Pacific Inc., is a corporation organized under the laws of the State of West Virginia and is now and has been since its incorporation, to-wit December 30, 1944, doing business within the State of California; said corporation, as plaintiff is informed and believes and therefore alleges, is a wholly owned subsidiary of Gravely whose officers and directors are identical or almost identical with the officers and directors of Gravely and all of whose capital stock is owned by Gravely and that said corporation was organized for the purpose of establishing a separate sales outlet for Gravely in California; that for the sake of convenience said corporation will hereinafter be referred to as "Pacific."

V.

Plaintiff is informed and believes and therefore alleges that First Doe Company, Second Doe Company and Third Doe Company are corporations do-

ing business in California, but is unaware of their true names or of the state of their incorporation and requests leave of the Court to insert such facts when and if the same are ascertained.

VI.

That plaintiff has been engaged for many years and now is engaged in the business of selling farm, garden, golf course, air field and similar kinds of supplies and equipment including garden and farm tractors, rotary plows and attachments, hand and power lawn mowers together with insecticides, fertilizers and like products; that plaintiff is a dealer and/or jobber and/or distributor of such merchandise and represents, and has for many years represented, the various manufacturers of the above-described and like products within the State of California; that plaintiff maintains complete sales quarters, repair shops, service and assembling departments for the storage, maintenance, repairing, assembling, displaying and selling of the products described above in connection with the operation of its business at San Francisco, California; that in addition thereto plaintiff employs a large number of persons in connection with the selling, servicing and repairing of said products and its salesmen cover the territory of Northern California and call upon both the retail trade as well as the ultimate consumers insofar as farm, golf course, air field and public park equipment is concerned.

VII.

That on or about the 7th day of December, 1925, at San Francisco, California, plaintiff's predecessor, H. V. Carter Company, entered into a written contract at San Francisco, California, with Gravely wherein Gravely granted to said H. V. Carter Company "the sole and exclusive right and privilege of selling Gravely Motor Cultivators, accessories and parts in that part of the State of California North of the sixth standard parallel South"; that said contract provided that it should be effective until such time as either party should give thirty days written notice to the other party of its cancellation; that said contract has never been cancelled by either party to it or by plaintiff as the successor of H. V. Carter Company and that ever since the date of said contract plaintiff has been and now is the exclusive dealer for all of the products manufactured by Gravely for the Northern California territory; that a copy of said contract is attached hereto marked "Exhibit A" and made a part hereof.

VIII.

That in connection with plaintiff's appointment as a dealer and distributor of Gravely products it has been required to and it does now maintain a sales and service personnel that is thoroughly familiar with Gravely products and are able to instruct purchasers of such equipment in the operation and maintenance thereof; it has further been necessary for plaintiff to maintain and it does now maintain adequate and independent display space

in its sales rooms for the display of said Gravely products together with adequate service and repair facilities together with trained personnel necessary to the sales, servicing and assembling of said products.

IX.

That shortly after the commencement of the Second World's War Gravely discontinued shipping its products to plaintiff and advised plaintiff that it was forced to do this for the reason that it was engaged in the manufacturing of war equipment for the United States Government and that it was unable to continue to supply its products to dealers, distributors, jobbers and other users as it had formerly done.

X.

That during said war years, to-wit 1942, 1943, 1944 and 1945 plaintiff notified its customers that it could not supply them with many of the products theretofore sold to them because of the advent of the war but did, as was the custom of many dealers, take orders from its customers for many products, including Gravely products, said orders being taken on the basis that as soon as the manufacturer who plaintiff represented commenced to manufacture such products after reconversion from war time activities, that such orders would be filled in the order of their priority; that as a result thereof plaintiff continued to receive and solicit orders from its customers for certain products including Gravely products on such basis and sent such orders into the various manufacturers that it represented, includ-

ing Gravely; that specifically plaintiff forwarded to Gravely, at its factory at Dunbar, West Virginia, forty-eight specific and individual orders for Gravely tractors and supplemental attachments within the past two and one-half years and did on July 3, 1946, place an order with Gravely for the purchase of a carload of Gravely tractors, said order bearing order number 31493, and that said carload lot contained forty-five tractors; that defendant Gravely, received and accepted all of said orders and acknowledged receipt of same and in no way did it notify or advise plaintiff that it would not accept said orders or that it would not deliver said tractors to plaintiff in fulfillment of said orders at such time as it became re-engaged in the manufacture thereof.

XI.

That for more than eighteen months last past, the exact date of the commencement of which is unknown to plaintiff, defendant, Gravely, has manufactured tractors and other products as described above and has supplied and delivered said tractors and other products to other dealers, jobbers, distributors and users throughout the United States and has also supplied and delivered such products to its wholly owned subsidiary, Pacific, in California and has delivered tractors to customers of plaintiff within Northern California upon orders forwarded to Gravely by plaintiff on behalf of such customers, but has failed and refused, and continues to fail and refuse to pay the commissions justly due

plaintiff thereon or to deliver or supply its products to plaintiff, including tractors and supplementary attachments, in fulfillment of plaintiff's orders hereinabove described and in violation of plaintiff's exclusive contract with Gravely, copy of which is set forth herein as "Exhibit A"; that plaintiff is informed and believes and therefore alleges that defendant, Gravely, in order to avoid meeting its obligations to plaintiff for compensation, commissions or other emoluments and in order to circumvent the fulfillment of plaintiff's orders for tractors received during the past two and one-half years and in order to further avoid the payment to plaintiff of commissions properly due it in connection with the sale of said tractors for which said orders were placed as described above, organized said Pacific as a wholly owned subsidiary and established the same in California purportedly as an independent dealer and distributor for Gravely products and has, since the establishment of said Pacific, satisfied orders received by it and has delivered tractors and other products to it for distribution to the trade and to plaintiff's customers; that such actions on the part of Gravely are in violation of the laws of the United States and the laws of the State of California; that in truth and in fact Pacific and Gravely are one and the same company having substantially the same officers and directors; that all of the issued and outstanding capital stock of Pacific is owned by Gravely; that in effect Gravely is selling its products directly to the trade through the use of its wholly owned subsidiary

Pacific and is collecting the full retail price for its products as a result thereof.

XII.

That by reason of the foregoing plaintiff has been damaged in an amount made up of the following items:

(a) Commissions due plaintiff upon the sale of ninety-three tractors and attachments at the rate of \$120.00 per tractor or \$11,160.00.

(b) Monies expended in altering and remodeling plaintiff's sales and service rooms in connection with the proper display, servicing and repairing of Gravely products in the sum of \$3000.00.

(c) General damages to plaintiff's reputation and standing with its customers, by its inability to fulfill long-standing orders placed with it in good faith for Gravely products, in the sum of \$10,000.00.

Wherefore, plaintiff prays judgment against the defendants and each of them for damages in the sum of \$24,160.00, together with its costs of suit incurred herein and for such other and further relief as the Court may deem meet and proper.

/s/ DAVID FREIDENRICH,
Attorney for Plaintiff.

State of California,
City and County of San Francisco—ss.

D. E. Graves, being first duly sworn, deposes and says:

That he is the president of H. V. Carter Company, Inc., a corporation; that said H. V. Carter

Company, Inc., is the plaintiff in the foregoing action; that he has read the foregoing complaint and knows the contents thereof. The same is true of his own knowledge, except as to matters which are therein stated on his information or belief and as to those matters, he believes it to be true.

/s/ D. E. GRAVES,

Subscribed and sworn to before me this 24th day of January, 1947.

[Seal] /s/ LOUIS WIENER,

Notary Public, in and for the City and County of San Francisco, State of California.

EXHIBIT A

This Agreement, Made and entered into this 7th day of December, 1925, by and between the Gravely Motor Plow and Cultivator Company, a corporation, of Dunbar, West Virginia, party of the first part, and H. V. Carter Company, of San Francisco, California, party of the second part.

Witnesseth: That for and in consideration of the conditions herein, the said party of the second part hereby agrees to purchase from the said party of the first part Five Gravely Motor Cultivators, and to pay therefor the sum of \$190.00 each, f. o. b. Dunbar, West Virginia, less distributors discount of twenty-five and ten per cent, and the said party of the first part does hereby grant to the said party of the second part the sole and exclusive right and privilege of selling the Gravely Motor Cultivator,

accessories, and parts in that part of the State of California North of the 6th standard parallel South.

This Agreement, to be effective as long as is mutually satisfactory to the parties hereto and may be canceled by either, giving 30 days written notice to the other.

Terms:—Net cash on receipt of invoice or Trade Acceptance payable 60 days from date of invoice.

It is specifically understood and agreed between the parties hereto that the said party of the second part shall keep a sufficient number of cultivators and accessories and parts in stock at all times to supply a reasonable demand, and that he shall use his best efforts to push the sale of said cultivators.

It is agreed that any parts on hand with the second party at the expiration of this agreement may be returned to the first party at Dunbar, West Virginia, by prepaid freight and first party will refund to second party the original cost of such parts to second party.

Guarantee: All Gravely Motor Cultivators are guaranteed to second party by first party to be made in a workmanlike manner and free from defective material or workmanship. This guarantee to become effective the date the tractor is sold to the consumer and to extend for a period of 90 days. All defective parts will be replaced free providing such parts are returned to factory of first party with changes prepaid and when on examination show clearly they are defective.

It is further mutually agreed and understood between the parties hereto that all orders for ma-

chines and accessories and parts under this contract are made by the said party of the second part and accepted by the said party of the first part subject to strikes, accidents, transportation tieups, and any and all other causes beyond the control of the said party of the first part.

In Witness Whereof, the parties hereto have hereunto affixed their signatures this 7th day of December, 1925.

GRAVELY MOTOR PLOW
AND CULTIVATOR
COMPANY,

By /s/ L. H. WEBER,
H. V. CARTER COMPANY,
First Party.

By /s/ D. E. GRAVES,
Second Party,
Distributor.

[Endorsed]: Filed Superior Court February 13, 1947.

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO
THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

The petition of Gravelly Motor Plow and Cultivator Company, a corporation, and Gravelly-Pacific,

Inc., a corporation, respectfully shows and represents to this Honorable Court:

I.

The petitioners appear herein specially and solely for the purpose of removing said cause to the United States District Court in and for the Northern District of California, Southern Division.

II.

The above-entitled action has been brought in this Court and is now pending therein, and the time within which said defendants are required to answer or otherwise plead has not yet expired.

III.

Said cause of action is of a civil nature, being an action to recover amounts alleged to be due plaintiff from defendants for alleged breach of contract. Said action is one of which the United States District Courts are given jurisdiction, as will appear from the allegations of this petition and the complaint on file herein.

IV.

The value of the matter in controversy in the said action is in excess of three thousand dollars (\$3,000), exclusive of interest and costs, as appears from the allegations of plaintiff's complaint on file herein.

V.

The controversy in said action is, and at the time of the commencement of said action was, entirely between citizens of different states, in that your

petitioners were at the time of the commencement of said action and still are corporations duly organized and existing under the laws of the State of West Virginia and are, and each of them is, a citizen of said State; and plaintiff in the above-entitled action was at the time of the commencement of said action and still is a corporation organized and existing under the laws of the State of California and a citizen of said State.

VI.

Plaintiff has fraudulently and improperly joined First Doe Company, Second Doe Company and Third Doe Company, corporations, as co-defendants with your petitioners for the sole purpose of attempting to defeat the jurisdiction of the courts of the United States and the right of your petitioners to remove this cause to said court; that the joining of said defendants First Doe Company, Second Doe Company and Third Doe Company as co-defendants with your petitioners is not made in good faith for the purpose of obtaining a judgement against said defendants, as no cause of action is stated or attempted to be stated against said defendants First Doe Company, Second Doe Company and Third Doe Company.

VII.

Your petitioners present herewith a good and sufficient bond, as provided by the statute in such cases, that it will enter in the District Court of the United States, for the Northern District of California, Southern Division, within thirty (30) days from the

date of filing this petition, a certified copy of the record in this action and that it will pay all costs which may be awarded by the said District Court in case the said Court shall hold that this action was wrongfully or improperly removed thereto.

Wherefore, your petitioners pray that this Court proceed no further herein, excepting to make an order accepting the bond presented herewith and directing that a transcript of the record herein be made for filing in the United States District Court for the Northern District of California, Southern Division.

GRAVELY MOTOR PLOW AND
CULTIVATOR COMPANY.

By D. RAY HALL,

Pres.

GRAVELY-PACIFIC, INC.,

By D. RAY HALL,

Pres.

Petitioners.

SAMUEL S. STEVENS,

HELLER, EHRMAN, WHITE &

McAULIFFE,

Attorneys for Petitioners.

State of West Virginia,
County of Kanawha—ss.

D. Ray Hall, being first duly sworn, deposes and says:

That Gravely Motor Plow and Cultivator Company, one of the defendants in the above-entitled action and one of the petitioners named in the above and foregoing petition, is a corporation; that affiant is an officer, to wit, president of said corporation, and as such he is authorized to and does make this verification for and on behalf of said corporation; that affiant has read the above and foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and as to those matters he believes it to be true.

D. RAY HALL.

Subscribed and sworn to before me this 8th day of March, 1947.

[Seal] · ILMA HOLSCLOW,
Notary Public in and for the County of Kanawha,
State of West Virginia.

My commission expires January 27, 1951.

[Endorsed]: Filed Superior Court, March 17, 1947.

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

This cause coming on for hearing upon petition and bond of the defendants Gravely Motor Plow and Cultivator Company, a corporation, and Gravely-Pacific, Inc., a corporation, for an order transferring this cause to the United States District Court, Northern District of California, Southern Division, and it appearing to the court that said defendants have filed their petition for such removal in due form of law and that said defendants have filed their bond duly conditioned with good and sufficient sureties as provided by law, and that said defendants have given plaintiff due and regular notice thereof, and it appearing to the court that this is a proper cause for removal to said United States District Court;

Now, Therefore, said petition and bond are hereby accepted, and it is hereby Ordered and Adjudged that this cause be and it is hereby removed to the United States District Court, Northern District of California, Southern Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in open court this 17 day of March, 1947.

HERBERT C. KAUFMAN,
Judge of the Superior Court.

[Endorsed]: Filed Superior Court, March 17,
1947.

[Title of Superior Court and Cause.]

CERTIFICATE OF CLERK

I, Robert Munson, County Clerk of the City and County of San Francisco, and ex-officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, do hereby certify the above and foregoing is a full, true and complete record of the transcript of record, and the whole thereof, in the above-entitled suit heretofore pending in said Superior Court, being suit No. 362371, wherein H. V. Carter Co., Inc., is plaintiff, and Gravely Motor Plow and Cultivator Company, a corporation, Gravely Motor Plow and Tractor Co., Inc., a corporation, Gravely-Pacific, Inc., a corporation, First Doe Company, Second Doe Company and Third Doe Company, corporations, are defendants, and said record consists of:

(1) Complaint for Damages (Breach of Contract);

(2) Notice of Filing of Petition and Bond for Removal to the United States District Court, Northern District of California, Southern Division;

(3) Petition for Removal of Cause to the United States District Court, Northern District of California, Southern Division;

(4) Notice of Order for Removal;

(5) Affidavit of Service;

(6) Order for Removal.

Witness my hand and seal this 15th day of April,
1947.

[Seal] ROBERT MUNSON,
County Clerk and Ex-Officio Clerk of the Superior
Court in and for the City and County of San
Francisco, State of California.

By /s/ F. FOURNIER,
Deputy Clerk.

[Endorsed] Filed U. S. D. C. April 15, 1947.

In the District Court of the United States in and for
the Northern District of California, Southern
Division

No. 27114H

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC, INC.,
a Corporation, FIRST DOE COMPANY, SEC-
OND DOE COMPANY and THIRD DOE
COMPANY, corporations,

Defendants.

NOTICE OF MOTION OF DEFENDANT
GRAVELY MOTOR PLOW AND CULTI-
VATOR COMPANY, a Corporation, TO
QUASH SERVICE OF SUMMONS AND
TO DISMISS SUIT AS TO SAID DEFEND-
ANT

To H. V. Carter Co., Inc., plaintiff herein, and to
David Freidenrich, Esq., its attorney:

You, and Each of You, Are Hereby Notified that
Gravely Motor Plow and Cultivator Company, a
corporation, one of the defendants in the above-
entitled action, will, on Monday, the 28th day of
April, 1947, at the hour of 10:00 a.m., of said day,
or as soon thereafter as counsel may be heard, ap-

pearing specially for this purpose and for no other purpose, move the above-entitled court, Honorable George B. Harris, Judge thereof, for an order to quash the service of summons on said defendant Gravely Motor Plow and Cultivator Company and to dismiss the action as to said defendant.

Said motion will be made on the grounds:

(1) That said defendant is a corporation organized under the laws of the State of West Virginia, and said corporation was not and is not subject to service of process within the State of California and that said defendant has not been properly served with process in this action;

(2) That said defendant is a corporation organized under the laws of the State of West Virginia, and is not now nor has it ever been doing business in the State of California and is not subject to the jurisdiction of this Court.

Said motion will be based on the affidavits of D. Ray Hall and John W. Heinen, copies of which are attached hereto, marked Exhibit "A" and Exhibit "B," respectively, which affidavits are by this reference made a part hereof.

Dated: April 16, 1947.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE
& McAULIFFE,

Attorneys for Defendant, Gravely Motor Plow and
Cultivator Company.

EXHIBIT A

[Title of District Court and Cause.]

AFFIDAVIT OF D. RAY HALL

State of West Virginia,
County of Kanawha—ss.

D. Ray Hall, being duly sworn, deposes and says:

That he is an officer, to-wit, President, of Gravely Motor Plow and Cultivator Company, a West Virginia corporation, with its principal place of business in Dunbar, West Virginia, one of the defendants named in the above-entitled action; that said corporation does not now maintain nor has it ever maintained an office or place of business, of any nature or description, within the State of California; that said corporation does not now transact nor has it ever transacted business within the State of California; that said corporation has no employees, officers, agents, or other representatives residing in or doing business within the State of California; that said corporation has never complied with the laws of the State of California relating to foreign corporations, and has never designated an agent for the service of process or authorized any agent or person to receive service of process within the State of California; that said corporation has no stock of merchandise within the State of California; that said corporation has no bank accounts or any other property of any nature or description within the State of California;

That affiant has been advised that a copy of the

summons and complaint in the above-entitled action was delivered to John W. Heinen, in the County of Los Angeles, State of California, on the 17th day of February, 1947; that John W. Heinen is not now nor has he ever been an officer, employee, agent, or other representative of Gravely Motor Plow and Cultivator Company, nor has said John W. Heinen at any time been authorized to accept or receive service of summons against said Gravely Motor Plow and Cultivator Company;

That affiant has been advised and so states that the only service of process on the defendant Gravely Motor Plow and Cultivator Company in the above-entitled action is the attempted service of process on said John W. Heinen on the 17th day of February, 1947, in the County of Los Angeles; affiant has been further advised and so states that plaintiff claims to have acquired jurisdiction of defendant Gravely Motor Plow and Cultivator Company by serving a copy of the summons and complaint on John W. Heinen, a representative of defendant Gravely-Pacific, Inc., for the reason that Gravely Motor Plow and Cultivator Company is the owner of substantially all the issued and outstanding capital stock of defendant Gravely-Pacific, Inc.;

That affiant further states that he is an officer, to wit, President of Gravely-Pacific, Inc., a corporation, the defendant named in the above-entitled action; that said corporation is organized under the laws of the State of West Virginia, and is now and since the 4th day of September, 1945, has been qualified to do business in the State of California;

that Gravely-Pacific, Inc. has issued and outstanding twenty-three shares of common stock of the par value of \$100 per share, of which shares Gravely Motor Plow and Cultivator Company is the owner of twenty, and affiant, Sibyl Hall, his wife, and Kenneth Thomas are and each of them is the owner of one of said shares.

/s/ D. RAY HALL.

Subscribed and sworn to before me this 31st day of March, 1947.

[Seal] /s/ ILMA HOLSCLOW,
Notary Public in and for the County of Kanawha,
State of West Virginia.

My commission expires January 27, 1951.

EXHIBIT B

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN W. HEINEN

State of California,
City and County of San Francisco—ss.

John W. Heinen, being duly sworn, deposes and says:

That he is an employee, to wit, Manager of Gravely-Pacific, Inc., a corporation, one of the defendants in the above-entitled action; that said corporation is organized under the laws of the State of West Virginia and is duly and regularly qualified to do business in the State of California;

That a copy of the summons and complaint in the above-entitled action was served on affiant on the 17th day of February, 1947; that affiant is not now nor has he ever been an officer, agent, representative, or employee of Gravely Motor Plow and Cultivator Company, nor has affiant ever been authorized to accept or receive service of process in the State of California against Gravely Motor Plow and Cultivator Company.

/s/ JOHN W. HEINEN.

Subscribed and sworn to before me this 9th day of April, 1947.

[Seal] /s/ CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 17, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF D. E. GRAVES IN OPPOSITION TO MOTION OF GRAVELY MOTOR PLOW AND CULTIVATOR COMPANY TO QUASH SERVICE OF SUMMONS, ETC.

State of California,
City and County of San Francisco—ss.

D. E. Graves, being first duly sworn, deposes and says:

That he is an officer, to wit, President, of H. V.

Carter Co., Inc., a California corporation having its principal place of business in the City and County of San Francisco, State of California, and plaintiff herein.

Affiant is now and has been the active manager of the business and affairs of plaintiff since its inception as a corporation more than ten years ago and for a long period of time prior thereto, when said company was unincorporated.

Affiant denies that defendant Gravely Motor Plow and Cultivator Company has never done business within the State of California or that it has no employees, agents, or representatives in California as sworn to in the affidavit of D. Ray Hall, the president of said defendant; that in truth and in fact said defendant has for a long period of time had direct dealings with persons and firms in California regarding the sale, purchase, and shipping of said defendant's products to said persons and firms within the State of California; that the names and addresses of some of the persons and firms with which said defendant has had direct dealings in California over an extended period of time are as follows:

Willard H. Johnson, of Santa Cruz, California;
Shell Oil Company, San Francisco, California;
K. S. Gordon, Paradise, California;
A. S. Borso, Vallejo, California;
W. R. Graham, Paradise, California;
L. P. Moore, Richmond, California;

that in addition thereto affiant states that on August

23, 1946, plaintiff received from John W. Heinen, as manager of Gravely-Pacific, Inc., a letter, copy of which is attached hereto and marked Exhibit A, wherein the said Heinen attempted to terminate plaintiff's relationship as a dealer with the defendant Gravely Motor Plow and Cultivator Company;

That thereupon affiant on behalf of plaintiff and on August 30, 1946, replied to said letter of August 23, 1946, copy of which reply is attached hereto and marked Exhibit B; that on said day affiant also dispatched a letter to the defendant Gravely Motor Plow and Cultivator Company, copy of which is likewise attached hereto and marked Exhibit C;

That thereafter and on September 10, 1946, affiant received a reply from the defendant Gravely Motor Plow and Cultivator Company dated September 5, 1946, wherein said defendant admitted that the said Heinen was acting on its instructions when he sent his letter of August 23rd to plaintiff; said letter of September 5, 1946, also states that said defendant was notifying the said Heinen to "attempt to secure another dealer" in the place of plaintiff for the sale of said defendant's products in the Northern California area; that a copy of said letter of September 5, 1946, is attached hereto and marked Exhibit D;

That said defendant Gravely Motor Plow and Cultivator Company admits in the affidavit of its president, D. Ray Hall, that it owns twenty out of twenty-three shares representing all of the outstanding stock of Gravely-Pacific, Inc., and that the other three shares are owned by Hall, his wife,

Sybil Hall, and Kenneth Thomas; that in said affidavit the said D. Ray Hall admits that he is the president of defendant Gravely-Pacific, Inc., as well as being the president of defendant Gravely Motor Plow and Cultivator Company; that the said Kenneth Thomas is an officer and director of defendant Gravely Motor Plow and Cultivator Company, to wit, secretary, and is also an officer and director of defendant Gravely-Pacific, Inc., to wit, its treasurer; that in addition thereto A. Garnett Thompson is a director and officer of the defendant Gravely-Pacific, Inc., to wit, its secretary, and is also the attorney for and a director of defendant Gravely Motor Plow and Cultivator Company; that it will be noted from Exhibits A and D that the general makeup of the letterheads of defendants Gravely Motor Plow and Cultivator Company and Gravely-Pacific, Inc., are identical save and except that one bears the name of one defendant and one bears the name of the other;

That affiant is informed and believes and therefore avers that defendant Gravely-Pacific, Inc., is the only one of nineteen similar subsidiary corporations owned, controlled, directed and operated by the defendant Gravely Motor Plow and Cultivator Company and which act exclusively as distributing agents for the parent company in various localities throughout the United States and that all of said subsidiary corporations were incorporated by the parent company in the State of West Virginia and that the expenses necessary to the incorporation of said subsidiary companies were paid by said parent

company, to wit, defendant Gravely Motor Plow and Cultivator Company, and that the sole capital contribution paid into each of these subsidiary corporations was contributed by said parent company;

That the said John W. Heinen is not an officer of Gravely-Pacific, Inc., but is an employee thereof and acts as the manager of said company in California; that all of the officers of said company reside in the State of West Virginia and are officers and directors of the defendant Gravely Motor Plow and Cultivator Company; that said Heinen as manager of the California office acts under the complete control and direction of the defendant Gravely Motor Plow and Cultivator Company, by and through its officers and directors.

/s/ D. E. GRAVES,

Affiant.

Subscribed and sworn to before me this 25th day of April, 1947.

[Seal] /s/ LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California.

Exhibit A

Gravely Power Equipment

For

Lawn, Garden and Field

Telephone: Citrus 1-7321

Gravely Pacific, Inc.

Distributing Agents

623 South Glendale Avenue

Glendale 5, California

August 23, 1946

H. V. Carter Co., Inc.

Mr. D. E. Graves,

President,

52 Beale St., San Francisco, Cal.

Dear Mr. Graves:

First I want to congratulate you on your progress in modernizing and improving your Sales Room. Your company is one to be proud of and I know shall always operate with success.

It is apparent, however, Mr. Graves, that you have not and do not intend to go ahead with our instructions, as outlined to you at our conference with your assistant, during my last trip to San Francisco. It simply is this, Mr. Graves, that your setup is not the proper place for handling Gravely Products under our distribution plan.

We have arrived at the conclusion that it would for the best of all concerned to release you from further obligation in handling Gravely Products. You have done a grand job in the past with what

you have received, and we greatly appreciate your cooperation in so many instances.

You may consider this letter an abrogation of any contractual obligations you may have felt you had with us or with our factory.

I believe you have realized all along that this break must come and that you will see our point of view in establishing a new outlet for Gravely.

With very best regards.

Sincerely your,

/s/ JOHN W. HEINEN,
Manager.

JWH:ps

Exhibit B

August 30, 1946

Gravely Pacific, Inc.
623 So. Glendale Ave.
Glendale 5, California

Attention: Mr. John W. Heinen, Manager

Gentlemen:

Your letter of the 23rd releasing us from obligations to handle Gravely products seems clear in its intent, altho it is confusing, in the light of things.

There is no formal contract between Gravely Pacific, Inc., and H. V. Carter Co., Inc., as you advised us you had not sent the contract to the factory, who were jointly concerned in the contract. We, therefore, consider that document ineffective, in view of your action on the matter and your expressions relating thereto.

The relationships between us have been on the basis of prior contracts, mutual understanding, correspondence and good faith, existing over a period of many years. On this basis, we have proceeded in the securing of orders for Gravely tractors and equipment, have continued to encourage our customers to place their orders with us for Gravelys on the basis of our mutual understandings and have rendered mechanical and other services to the customers and owners.

As we wrote you recently, we have modernized the first floor of our building and have made a very attractive place to exhibit and from which to sell Gravely tractors, when we have some to show and sell.

We wrote you when we sent you the contract together with an order directed to you and Gravely Company at Dunbar, for a carload of Gravely tractors and equipment, that "It is our plan to conform to the general sales and service policy of the Gravely factory and Gravely Pacific and to this end we extend you our full cooperation."

In response to it, you wrote and congratulated us and expressed your appreciation of our cooperative spirit, etc. Therefor, we repeat that your letter of August 23rd is confusing.

You will concede that our opinion and that of our attorney, to the effect we could not release either Gravely-Pacific or the Gravely firm at Dunbar, from filling our orders already placed, is logical.

We have accepted the orders from the customers

and have in turn placed our orders with the factory and with Gravely-Pacific, for tractors and equipment with which to fill these orders. It is needless to go into details, as to the loss we would incur if we did not supply the tractors and equipment already sold to the customers.

A copy of this letter is being sent to Dunbar, so that we can all have a full understanding of the position we assume in view of your comments which came to us as quite a surprise.

We await your further communications with interest.

Sincerely yours,

H. V. CARTER CO., INC.

DEG:LW

Exhibit C

Aug. 30, 1946

Gravely Motor Plow & Cult. Co.

Dunbar, West Virginia

Attention: Mr. Kenneth Thomas, Secretary

Gentlemen:

In view of the fact, the correspondence with your Dunbar headquarters office during the past months has been conducted with you, we are writing you relative to the letter written us by Mr. Heinen of the Gravely-Pacific. This was quite disconcerting, coming as it did after about 20 years relationships.

Enclosed is a copy of the letter we wrote in reply to Mr. Heinen and in which we tried to be as clear as possible in stating our objectives and position.

The contract we sent to Glendale was voided, as Mr. Heinen advised he did not send it for your approval, so we will disregard that document. However, the order for the carload of tractors and equipment, of which order we enclose a copy was directed to you and to Gravelly Pacific jointly and individually.

We enclose a copy of the letter we sent with the contract and order, all of which together with our letter of this day to Glendale seems to place the matter before you clearly.

Without doubt, you have a copy of the letter written us by Mr. Heinen on August 23rd. With this data before you and your officials, you will be in position to write us your comments.

Very truly yours,

H. V. CARTER CO., INC.

DEG:LW

Enclosure

Exhibit D

Gravely Power Equipment
For
Lawn, Garden and Field

Telephone: 81-234

Gravely Motor Plow & Cultivator Company
Manufacturers
Dunbar, W. Va., U. S. A.

Sept. 5, 1946

D. E. Graves
H. V. Carter Company, Inc.
52 Beale Street
San Francisco 5, California

Dear Mr. Graves:

It is right that I should reply to your letter of August 30th addressed to the attention of Mr. Thomas, for I so well recall my conversation with you back here when you visited us. I think I was quite plain in telling you what the Gravely Pacific or the Gravely Motor Plow either would require in case we would continue with you. As pointed out you handled too many competitive lines and that you could not expect us to continue unless you did certain things. One of these was to put a separate store and organization on Gravely alone. You hedged on this, but finally promised in an indirect manner that you would. Now, Mr. Heinen reports that you had not done this and it was upon my suggestion that he notify you that you could not continue.

There seems but little else to say. Your inference that this is a matter for a lawyer to determine does not set too well with me. The only way you could retain the agency would be to handle it right and that you show you don't intend to do.

The letter I have here will bear out what I have said above.

I am sending a copy of this to Mr. Heinen and I am suggesting to him that he attempt to secure another dealer in that area. On the orders that you actually have for Gravely I would suggest that you inform the customers you no longer have the agency and give them the opportunity of ordering from the new dealer or to cancel the order.

Yours sincerely,

GRAVELY MOTOR PLOW
AND CULTIVATOR COM-
PANY

By /s/ D. RAY HALL,
President.

[Endorsed]: Filed April 26, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF EDWIN F. HINER

State of West Virginia,
County of Kanawha—ss.

Edwin F. Hiner, being duly sworn, deposes and says:

That he is an employee, to wit, managing director, of Gravely Pacific, Inc., a West Virginia corporation, with its principal place of business in South Charleston, West Virginia, said corporation being one of the above-named defendants; that he has held said position of managing director since November 1, 1945; that he has not held any office or position whatsoever with Gravely Motor Plow and Cultivator Company, a corporation, one of the above-named defendants, at any time since he has held said position of managing director; and that as such managing director he has general charge of the affairs of Gravely Pacific, Inc.

Affiant further says that the relations between said Gravely Pacific, Inc., and said Gravely Motor Plow and Cultivator Company are governed entirely by written contract dated the 1st day of January, 1945, as modified by written contract dated the 1st day of January, 1946, entered into by and between Gravely Motor Plow and Cultivator Company and Gravely Pacific, Inc.; that all of the books and records of said two corporations are kept at different locations and are entirely separate and distinct; that no officer or employee of said Gravely Motor Plow and Cultivator Company, as such officer or employee, has any authority or control whatsoever over said Gravely Pacific, Inc., or its affairs; that shipments of merchandise by Gravely Motor Plow and Cultivator Company to Gravely Pacific, Inc., are made by freight, express, truck or parcel post, as circumstances dictate, on a thirty day net cash

basis; and that payment therefor is made by Gravely Pacific, Inc., by check in due course.

Affiant says further that no officer or employee of said Gravely Pacific, Inc., as such, has any rights or duties in relation to Gravely Motor Plow and Cultivator Company; and that neither said Gravely Pacific, Inc., nor any of its officers or employees, has any authority to act for or to bind said Gravely Motor Plow and Cultivator Company in the absence of express authorization in the particular instance.

/s/ EDWIN F. HINER.

Subscribed and sworn to before me this 21st day of May, 1947.

[Seal] /s/ ILMA HOLSCLOW,
Notary Public in and for the County of Kanawha,
State of West Virginia.

My Commission expires January 27, 1951.

[Endorsed]: Filed May 26, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF D. RAY HALL

State of West Virginia,
County of Kanawha—ss.

D. Ray Hall, being duly sworn, deposes and says:
That he is an officer, to wit, President of Gravely Motor Plow and Cultivator Company, a West Virginia corporation, one of the defendants named in the above-entitled action that on or about January

1, 1945, said Gravely Motor Plow & Cultivator Company entered into a written agreement with Gravely Pacific, Inc., a corporation, and also one of the above-named defendants, bearing date the 1st day of January, 1945, whereby said Gravely Pacific, Inc., was given the exclusive right to sell, distribute and service, in the states of California, Nevada, Idaho, Montana and Wyoming, the garden tractors and equipment, and repair parts for the same, manufactured by Gravely Motor Plow and Cultivator Company, that on or about January 1, 1946, by written agreement of that date between said Gravely Motor Plow and Cultivator Company and Gravely Pacific, Inc., the territory within which said Gravely Pacific, Inc., should have such exclusive right to sell, distribute and service was changed to the states of California, Nevada, Arizona and Utah, said agreement of the 1st day of January, 1945, being otherwise continued in full force and effect; and that photostats of each of said two agreements referred to are hereto attached and asked to be read and considered as part of this affidavit.

Affiant further says that said agreement of January 1, 1945, was in continuous effect according to its terms until modified as aforestated by said agreement of the 1st day of January, 1946; and that as so modified it has ever since been, and now is, in full force and effect.

Affiant further says that there have been no other agreements, verbal or written, governing the relations of said two corporations, and that no officer or employee of said Gravely Motor Plow and Culti-

vator Company, as such officer or employee, has any rights or duties in connection with the control, management or operation of said Gravely Pacific, Inc.

Affiant further says that the offices of said two corporations are in different localities, and that the books of account and other records of each of said corporations are kept at its own office, by its own personnel, and are completely separate and distinct; and that the books of the two corporations are audited by different auditors.

Affiant further says that merchandise ordered from Gravely Motor Plow and Cultivator Company by Gravely Pacific, Inc., is shipped by the former to the latter by freight, truck, express or parcel post, as the circumstances may require, on terms net cash in thirty days and that payment therefor is made by Gravely Pacific, Inc., by its check, or checks, payable to Gravely Motor Plow and Cultivator Company.

/s/ D. RAY HALL.

Subscribed and sworn to before me this 21st day of May, 1947.

[Seal] /s/ ILMA HOLSCLOW,
Notary Public in and for the County of Kanawha,
State of West Virginia.

My commission expires January 27, 1951.

This Agreement, made and entered into in duplicate as of the 1st day of January, 1945, by and between Gravely Motor Plow and Cultivator Company, a corporation organized and existing under the laws of the state of West Virginia, having its chief office and place of business at Dunbar, West Virginia, party of the first part, sometimes hereinafter referred to as "manufacturer," and Gravely Pacific, Inc., a like corporation, having its chief office and place of business at Charleston, West Virginia, party of the second part, sometimes hereinafter referred to as "distributor";

Witnesseth:

That Whereas the party of the first part is engaged in the manufacture and sale of garden tractors and equipment, and repair parts for the same, at Dunbar, West Virginia, and is desirous of providing for the distribution, sales and service of its products in the territory hereinafter designated;

And Whereas the party of the second part was incorporated for the purpose of obtaining a contract for the distribution, sales and service of such products in the territory referred to;

Now Therefore, for and in consideration of the mutual agreement herein contained, it is agreed between the parties hereto as follows:

(1) The distributor is hereby given for the term of this contract, the exclusive right to sell, distribute and service the garden tractors and equipment, and repair parts for the same, manufactured by the manufacturer, in the following territory: in the

states of California, Nevada, Idaho, Montana and Wyoming.

(2) The distributor agrees to maintain a competent and aggressive sales force, and an adequate show room and repair shop; to make diligent efforts to cover such territory in connection with sales, service and repairs; and to deal exclusively in the manufacturer's products (except such other products as may be acquired by the distributor as trade-ins on the sale of the manufacturer's products).

(3) The distributor agrees to keep on hand, so far as available, samples of the manufacturer's products, and to make proper display thereof.

(4) The distributor agrees to advertise the manufacturer's products in the territory mentioned, in keeping with good business practice.

(5) The manufacturer may, if in its judgment proper, incur expenses by way of advertisement or otherwise for the purpose of promoting sales of the manufacturer's products in the hereinbefore defined territory and in such event the manufacturer may charge a reasonable proportion thereof to the distributor's account. However, no such expense shall be incurred without thirty days' prior advice of the manufacturer to the distributor, which notice shall disclose the nature and amount of the expense to be incurred, together with the proportion thereof intended to be charged against the distributor's account. If the distributor objects to the proposed charge against its account, it shall promptly in writing so advise the manufacturer, stating in full

the reasons for its objection. If the parties cannot then agree on the amount and nature of such expense, it shall not be incurred, but the manufacturer shall have the right, on sixty (60) days' written notice, to terminate this agreement.

(6) The manufacturer agrees, to the extent that is possible in view of governmental restrictions and priorities, and in so far as is justified by its facilities for manufacturing, and its markets and obligations in other territories, to supply the distributor with the manufacturer's products as required by the distributor.

(7) The distributor shall pay to the manufacturer, on such reasonable terms as may be required by the manufacturer, the list price on all products obtained from the manufacturer, less a forty per cent (40%) discount from the list price. Such products may be obtained from the manufacturer by the distributor on open account, to be settled monthly, provided the financial condition of the distributor makes such procedure sound business practice, and provided the manufacturer is allowed at all times full access to the accounts payable and receivable and such other bookkeeping and financial records of the distributor as may be deemed necessary by the manufacturer to establish the financial condition of the distributor.

(8) The manufacturer shall refer to the distributor all inquiries received from the territory mentioned, for the purchasing, servicing or repairing of the manufacturer's products.

(9) The distributor shall furnish all its own

facilities for the sale, servicing and repairing of the manufacturer's products in such territory.

(10) The distributor agrees to follow up without delay all sales or service leads in such territory furnished it by the manufacturer.

(11) Orders taken by the distributor for the manufacturer's products shall be taken in the distributor's name, except that the same may be taken in the name of the manufacturer if, and only if, any such orders are first subject to approval by the manufacturer and in any such case the distributor shall be responsible for collecting the purchase price and paying to the manufacturer the part thereof to which the manufacturer is entitled.

(12) In no case where the manufacturer's products are sold direct by the manufacturer, or by any party other than the distributor, in the territory where the distributor does not have the exclusive right of sale, shall the distributor be entitled to any commission thereon, even though the products so sold are subsequently brought into the territory in which the distributor has the exclusive right of sale.

(13) It is understood that the distributor is an independent contractor, and is not empowered in any way, shape or form to bind the manufacturer. No agreement of any kind affecting, or purporting to affect, the manufacturer shall be entered into between the distributor and any third person without the express written consent of the manufacturer in each instance. A waiver of this requirement in any particular instance shall not be considered as a waiver thereof in any subsequent instance.

(14) This agreement is to be effective from its date, until and including December 31, 1945, and thereafter until terminated by either party hereto by ninety days' written notice by registered mail to the other.

(15) In the event of any default in, or violation of, any provision of this agreement by either party hereto, continuing for a period of thirty days after written notice of default or violation, the other party hereto may thereupon terminate this agreement by written notice by registered mail to the other party.

In Witness Whereof the parties hereto have hereunto caused their respective names to be signed and corporate seals affixed.

GRAVELY MOTOR PLOW
AND CULTIVATOR CO.,

By /s/ D. RAY HALL,
Its President.

GRAVELY PACIFIC, INC.,
[Seal] By /s/ KENNETH THOMAS,
Its Treasurer.

This Agreement, made and entered into in duplicate as of the 1st day of January, 1946, by and between Gravely Motor Plow and Cultivator Company, a corporation organized and existing under the laws of the state of West Virginia, having its chief office and place of business at Dunbar, West Virginia, party of the first part, sometimes herein-

after referred to as "manufacturer," and Gravely Pacific, Inc., a like corporation, having its chief office at South Charleston, West Virginia, and its chief place of business in the state of California, party of the second part, sometimes hereinafter referred to as "distributor";

Witnesseth:

That Whereas by written agreement made between the parties hereto, bearing date January 1, 1945, the distributor was given the exclusive right, subject to the provisions of said agreement, to sell, distribute and service the garden tractors and equipment, and repair parts for the same, manufactured by the manufacturer, in certain territory designated as the states of California, Nevada, Idaho, Montana and Wyoming;

And Whereas said agreement by its terms was to be effective from its date until and including December 31, 1945, and thereafter until terminated by either party hereto by ninety days written notice by registered mail;

And Whereas the parties hereto desire that said agreement shall remain in full force and effect as to all of its terms and provisions, except as to the territory in which the distributor is given the exclusive right to sell, distribute and service such garden tractors and equipment and repair parts;

Now Therefore, for and in consideration of the premises and of the mutual agreements herein contained, it is understood and agreed between the parties hereto that said written agreement of January 1, 1945, shall remain in full force and effect

as to all of its terms and provisions except that, beginning with the date of this instrument, the territory in which the distributor is given the exclusive right to sell, distribute and service such garden tractors and equipment and repair parts shall be, instead of the territory provided in said agreement of January 1, 1945, the states of California, Nevada, Arizona and Utah.

In Witness Whereof the parties hereto have hereunto caused their respective names to be signed and their corporate seals to be affixed.

GRAVELY MOTOR PLOW
AND CULTIVATOR CO.,

By /s/ D. RAY HALL,
Its President.

GRAVELY PACIFIC, INC.,
By /s/ A. G. THOMPSON,
Its Secretary.

[Endorsed]: Filed May 26, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF
D. E. GRAVES

State of California,
City and County of San Francisco—ss.

D. E. Graves, being first duly sworn, deposes and says:

That I am an officer, to wit, the president, of H. V.

Carter Co., Inc., the plaintiff herein; that during the years 1945 and 1946 I had a great deal of correspondence with Gravely Motor Plow and Cultivator Company and with Gravely Pacific, Inc., defendants above named; that all of my correspondence with Gravely Pacific, Inc., was with John W. Heinen as its manager and all of my correspondence with Gravely Motor Plow and Cultivator Company was with D. Ray Hall, its president, and Kenneth Thomas, its secretary; that at no time during the period mentioned did I ever have correspondence or receive any communication from Edwin F. Hiner on behalf of Gravely Pacific, Inc.; that during all of said time I was never informed or advised by any of the parties enumerated above that Edwin F. Hiner had any connection with or was employed by Gravely Pacific, Inc.;

That on October 6, 1945, I visited the Gravely factory at Dunbar, West Virginia, and at that time was introduced to Edwin F. Hiner, who was then personnel manager for Gravely Motor Plow and Cultivator Company, and I had a conversation with him, but was not advised by him or by anyone else at said factory that he was to be the managing director of Gravely Pacific, Inc.; that affiant is informed and believes and upon such information and belief alleges that the said Edwin F. Hiner is an employee of Gravely Motor Plow and Cultivator Company at the present time and that he maintains his office at the factory at Dunbar, West Virginia;

That Gravely Motor Plow and Cultivator Company has always controlled and directed and created

as to all of its terms and provisions except that, beginning with the date of this instrument, the territory in which the distributor is given the exclusive right to sell, distribute and service such garden tractors and equipment and repair parts shall be, instead of the territory provided in said agreement of January 1, 1945, the states of California, Nevada, Arizona and Utah.

In Witness Whereof the parties hereto have hereunto caused their respective names to be signed and their corporate seals to be affixed.

GRAVELY MOTOR PLOW
AND CULTIVATOR CO.,

By /s/ D. RAY HALL,
Its President.

GRAVELY PACIFIC, INC.,
By /s/ A. G. THOMPSON,
Its Secretary.

[Endorsed]: Filed May 26, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF
D. E. GRAVES

State of California,
City and County of San Francisco—ss.

D. E. Graves, being first duly sworn, deposes and says:

That I am an officer, to wit, the president, of H. V.

Carter Co., Inc., the plaintiff herein; that during the years 1945 and 1946 I had a great deal of correspondence with Gravely Motor Plow and Cultivator Company and with Gravely Pacific, Inc., defendants above named; that all of my correspondence with Gravely Pacific, Inc., was with John W. Heinen as its manager and all of my correspondence with Gravely Motor Plow and Cultivator Company was with D. Ray Hall, its president, and Kenneth Thomas, its secretary; that at no time during the period mentioned did I ever have correspondence or receive any communication from Edwin F. Hiner on behalf of Gravely Pacific, Inc.; that during all of said time I was never informed or advised by any of the parties enumerated above that Edwin F. Hiner had any connection with or was employed by Gravely Pacific, Inc.;

That on October 6, 1945, I visited the Gravely factory at Dunbar, West Virginia, and at that time was introduced to Edwin F. Hiner, who was then personnel manager for Gravely Motor Plow and Cultivator Company, and I had a conversation with him, but was not advised by him or by anyone else at said factory that he was to be the managing director of Gravely Pacific, Inc.; that affiant is informed and believes and upon such information and belief alleges that the said Edwin F. Hiner is an employee of Gravely Motor Plow and Cultivator Company at the present time and that he maintains his office at the factory at Dunbar, West Virginia;

That Gravely Motor Plow and Cultivator Company has always controlled and directed and created

the policies and activities of all of its sales agencies, including its distributors and including Gravely Pacific, Inc.; that Gravely Pacific, Inc., is not an independent distributor but is a branch and division of Gravely Motor Plow and Cultivator Company; that on many occasions the said John W. Heinen as manager of Gravely Pacific, Inc., has advised affiant both in writing and orally that he would have to seek directions from the factory before he could advise affiant with respect to inquiries made to him; that said John W. Heinen exercised no independent judgment nor did he have independent discretion concerning the relations between affiant's firm and the factory and that all matters concerning the sale, distribution, servicing and displaying of Gravely products were dictated and formulated by the Gravely Motor Plow and Cultivator Company and the said Gravely Pacific, Inc., acted merely as an agent and servant of said company for the carrying out of its policies and plans.

/s/ D. E. GRAVES.

Subscribed and sworn to before me this 6th day of June, 1947.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed June 9, 1947.

[Title of District Court and Cause.]

AFFIDAVIT OF PEARL G. SMITH

State of California,
County of Los Angeles—ss.

Pearl G. Smith, being first duly sworn, deposes and says:

That she was employed by Gravely Pacific, Inc., from January, 1946, to September, 1946, at its place of business in the City of Glendale, California, and that during all of said time she was in charge of the correspondence and accounting for said company and took full charge of all office matters during the absence of the manager of said company, to wit, John W. Heinen.

That affiant was familiar with all of the correspondence that passed between Gravely Pacific, Inc., and Gravely Motor Plow and Cultivator and that financial statements and auditor's reports of Gravely Pacific, Inc., were transmitted at regular intervals to D. Ray Hall, as President of Gravely Motor Plow and Cultivator Company, at Dunbar, West Virginia; and that to the best of her knowledge and belief, directions as to policy and procedure to be followed by Gravely Pacific, Inc., came from said D. Ray Hall, as President of said Company, and affiant has no recollection of ever seeing any correspondence from Edwin F. Heiner, or any

correspondence sent to him on behalf of Gravely Pacific, Inc.

/s/ PEARL G. SMITH.

Subscribed and sworn to before me this 10th day of June, 1947.

[Seal] /s/ IDA M. MURPHY,
Notary Public in and for the County of Los Angeles,
State of California.

My commission expires May 8, 1949.

[Endorsed]: Filed June 16, 1947.

[Title of District Court and Cause.]

ORDER

Defendant Gravely Motor Plow and Cultivator Company's motion to quash service of summons and to dismiss having been briefed, argued and presented to the court for decision, and the same having been duly considered,

It Is Ordered that the motion be and the same hereby is Denied.

Dated: June 20, 1947.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed June 20, 1947.

[Title of District Court and Cause.]

SECOND AMENDED ANSWER OF
DEFENDANT

Now comes defendant Gravely Motor Plow and Cultivator Company, a corporation, and by leave of court first had and obtained, files this, its second amended answer to the complaint on file herein, and admits, denies and alleges as follows:

I.

Denies each and every allegation contained in paragraph II of said complaint, except that this defendant admits it is a corporation organized under the laws of the State of West Virginia.

II.

Admits all the allegations contained in paragraph IV of said complaint, except that this defendant denies that Gravely-Pacific, Inc. is a wholly owned subsidiary of this defendant whose officers and directors are identical or almost identical with the officers and directors of this defendant.

III.

Admits the allegations contained in paragraph VII of said complaint, except this defendant denies that said contract dated the 7th day of December, 1925, has never been cancelled by either party to it, or by plaintiff as the successor of H. V. Carter Company, and denies that ever since the date of said contract plaintiff has been and now is the dealer for all the products manufactured by this defendant for the Northern California territory; and in this

behalf alleges that the agreement dated December 7, 1925, was made and entered into by and between this defendant and H. V. Carter, an individual doing business under the firm name and style of H. V. Carter Company that H. V. Carter died on or about the 17th day of August, 1931, and that by reason of the death of H. V. Carter said contract was terminated; that said contract was never assigned or transferred to plaintiff; that this defendant never consented to any transfer of said contract from H. V. Carter Company to plaintiff, and plaintiff has no right, title or interest in or to said contract as the successor of H. V. Carter Company or otherwise; that subsequent to the death of H. V. Carter, plaintiff acted only as a non-exclusive agent in Northern California for products manufactured by this defendant, which agency was subject to termination at any time; that subsequent to the death of H. V. Carter, no agreement, written or otherwise, was entered into between this defendant and plaintiff providing for the appointment of plaintiff as the exclusive dealer in Northern California for the products manufactured by this defendant; that in the year 1935 this defendant established a distributor in certain territory, including the State of California; that said distributor was authorized, with the acquiescence of this defendant, to constitute, maintain and/or discontinue dealers in said territory; that in the year 1935 plaintiff was definitely advised by said distributor, confirmed in writing by this defendant, that plaintiff's status as a dealer for this defendant was non-exclusive; that plaintiff at that time acknowledged its status as

being that of a non-exclusive dealer; that no contention was made by plaintiff at that time, or at any time thereafter, until the institution of this action, that said contract of December 7, 1925, was still in effect; and that on or about the 23rd day of August, 1946, all arrangements for the sale by plaintiff of products manufactured by this defendant were cancelled and terminated by written notice given to plaintiff by Gravely-Pacific, Inc., as the duly authorized representative of this defendant for said purpose.

IV.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of said complaint, and, therefore, denies each and every allegation contained therein.

V.

This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X beginning with the word "that" in line 21, page 4, and ending with the word "Gravely" in line 1, page 5, and, therefore, denies each and every allegation therein contained. Further answering the allegations contained in said paragraph X, beginning with the word "that" in line 8, page 5, and continuing to the end of the paragraph, this defendant admits that it received and acknowledged receipt of said orders, but denies that it accepted all of said orders or any thereof, and further denies that in no way did it notify or advise plaintiff that it would not accept

said orders, or that it would not deliver said tractors to plaintiff in fulfillment of said orders at such time as it became re-engaged in the manufacture thereof, or otherwise, or at all.

VI.

Denies each and every, all and singular, the allegations contained in paragraph XI of said complaint, except that this defendant admits it has for some time manufactured tractors and other products and has supplied and delivered said tractors and other products to other dealers, jobbers, distributors and users throughout the United States, and has also supplied and distributed such products to Gravely-Pacific, Inc.

VII.

Denies each and every, all and singular, the allegations contained in paragraph XII of said complaint.

For a Further and Separate Answer to said complaint, this defendant alleges that this Court is without jurisdiction over this defendant for the reason that it is not an inhabitant of the Northern District of California, nor is this defendant doing business nor has it ever done business in the State of California, nor has it any employee, agent or representative in the State of California, nor does it have or maintain a regular and established place of business in said State of California, nor does it conduct business of any nature or description in said State, and no valid service has been made upon this defendant.

Wherefore, this defendant prays to be hence dismissed with its costs of suit.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE
& McAULIFFE,

Attorneys for defendant Gravely Motor Plow and
Cultivator Company.

State of California,
City and County of San Francisco—ss.

D. Ray Hall, being duly sworn, deposes and says:

That he is an officer, to wit, President, of Gravely Motor Plow and Cultivator Company, a corporation, one of the defendants named in the foregoing action, and as such is authorized to make this verification for and on behalf of said corporation; that he has read the foregoing Second Amended Answer of Defendant Gravely Motor Plow and Cultivator Company and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

/s/ D. RAY HALL.

Subscribed and sworn to before me this 23rd day of November, 1948.

[Seal] CATHERINE E. KEITH,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 16, 1950.

[Endorsed]: Filed November 23, 1948.

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

Case No. 27114 H

H. V. CARTER CO, INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVA-
TOR COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC, INC.,
a Corporation, FIRST DOE COMPANY,
SECOND DOE COMPANY and THIRD DOE
COMPANY, corporations,

Defendants.

DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Gravely Motor Plow and Cultivator Company, hereinafter called "Gravely," moved the Court for an order to quash the service of summons on said defendant "Gravely" and to dismiss the action as to said defendant. The motion was denied by order entered June 20, 1947.

The answer of "Gravely" filed October 8, 1947, and each of the amended answers subsequently filed, urged by way of separate defense the question of the validity of the service.

At the beginning of the trial and again at the conclusion thereof the motion to quash service of summons on "Gravely" was renewed.

Service of process upon defendant "Gravely" was attempted to be made by delivering a copy of summons and complaint to John W. Heinen, Manager of Gravely-Pacific, Inc., a corporation, hereinafter referred to as "Pacific." "Pacific" is a corporate subsidiary of "Gravely." From the affidavits in support of the motion to quash and from the evidence adduced at the trial, it appears that "Gravely" and "Pacific" are separate corporate entities, both being incorporated under the laws of West Virginia. Each corporation employs separate personnel, the books of account and other records of each corporation are separately kept at their respective offices in different cities.

D. Ray Hall is President of both corporations; V. D. Tippet is Treasurer of "Gravely"; Kenneth Thomas is Secretary of "Gravely" and Treasurer of "Pacific"; A. G. Thompson is Secretary of "Pacific" and Counsel for "Gravely"; A. D. Williams is Vice-President of "Gravely" and Sybil Hall, wife of D. Ray Hall, is Vice-President of "Pacific." "Pacific" stock is owned by "Gravely" except three "qualifying shares."

"Pacific" purchases "Gravely" products on terms of net cash in 30 days and payments for all purchases are made by "Pacific" by its checks payable to "Gravely." The facts here as to the relations between the two corporations are like those considered by the United States Supreme Court in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S.Ct. 250. A case involving the same questions in regard to a subsidiary of "Gravely" was decided in

the Appellate Division, Supreme Court of New York, 69 N.Y. Supp. 175, the Court holding, under facts identical with those presented here, that the subsidiary was not an agent of the parent company. "Gravely" was not doing business in California in the sense that it was amenable to process in action in California.

It Is Ordered that defendant Gravely Motor Plow and Cultivator Company's motion for an order to quash service of summons on said defendant Gravely Motor Plow and Cultivator Company, and to dismiss the action as to said defendant, be, and the same hereby is granted, and plaintiff's complaint is hereby dismissed as to the defendant Gravely Motor Plow and Cultivator Company.

The Court, having heard the testimony and having examined the proof offered by the respective parties, and the cause having been submitted to the Court for decision, now finds the facts and states conclusions of law as follows:

Findings of Fact

1. That plaintiff H. V. Carter Co., Inc., is now, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California and authorized to do business within the State of California and having its principal place of business in the City and County of San Francisco.

2. That defendant Gravely Motor Plow and Cultivator Company is a corporation organized under the laws of the State of West Virginia and

that said defendant, hereinafter called "Gravely," is not now and has not at any of the times mentioned in plaintiff's complaint been doing business in the State of California in the sense that it would be amenable to service of process in said State.

3. That defendant Gravely-Pacific, Inc., hereinafter called "Pacific," is a corporation organized under the laws of the State of West Virginia and is now and has been, since its incorporation December 30, 1944, doing business within the State of California.

4. That all of the capital stock of "Pacific" is owned by "Gravely" except three shares, one of which is owned by D. Ray Hall, President of both corporations; one share owned by Sybil Hall, wife of said D. Ray Hall, and Vice-President of "Pacific"; and one of said three shares is owned by Kenneth Thomas, Treasurer of "Pacific" and Secretary of "Gravely"; that the officers of the two corporations are as follows:

"Gravely"

President.....	D. Ray Hall
Vice-President.....	A. D. Williams
Secretary.....	Kenneth Thomas
Treasurer.....	V. D. Tippet
Counsel.....	A. G. Thompson

"Pacific"

President.....	D. Ray Hall
Vice-President.....	Sybil Hall
Secretary.....	A. G. Thompson
Treasurer.....	Kenneth Thomas

That the auditor of "Gravely" is R. C. P. Waicher of Charleston, West Virginia; that the books and accounts and reports of "Gravely" are kept in Dunbar, West Virginia; that the auditor of "Pacific" is George Brun of Pasadena, California; that the books and records of account of "Pacific" are kept in Los Angeles, California; that the income tax returns of "Gravely" and "Pacific" are made separately.

5. That plaintiff for many years, now is, engaged in the business of distributions, sales and service of farm and garden tractors and similar kinds of supplies and equipment.

6. That on July 3, 1946, plaintiff placed an order with "Pacific" for 45 tractors (Exhibit X in evidence); that said order for 45 tractors was never acknowledged or accepted by "Pacific."

7. That the alterations and improvements made by plaintiff were permanent in nature and were being used at the time of the commencement of this action for the display of tractors and equipment other than those manufactured or sold by either of the defendants.

8. That plaintiff was not at any time an agent of "Pacific" and plaintiff was not at any time an exclusive dealer of tractors or any other equipment or supplies dealt in by "Pacific."

From the foregoing facts the Court concludes:

Conclusions of Law

1. That the defendant Gravely Motor Plow and Cultivator Company was not at any of the times

mentioned in plaintiff's complaint doing business in the State of California in the sense that said corporation would be amenable to service of process in said State.

2. That the defendant Gravely Motor Plow and Cultivator Company is entitled to judgment quashing the service of summons herein on said defendant and dismissing this action as to said defendant.

3. That defendant Gravely-Pacific, Inc., a corporation, is entitled to judgment denying the prayer of plaintiff's complaint and for costs herein incurred.

Let Judgment Be Entered Accordingly.

Dated: This 22nd day of June, A.D., 1949.

/s/ ROGER T. FOLEY,
United States District Judge.

Entered in civil docket June 24th, 1949.

[Endorsed]: Filed June 23, 1949.

In the District Court of the United States in and
for the Northern District of California, South-
ern Division

Case No. 27114 H

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVA-
TOR COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC, INC.,
a Corporation, FIRST DOE COMPANY,
SECOND DOE COMPANY and THIRD DOE
COMPANY, corporations,

Defendants.

JUDGMENT

The above-entitled cause coming on regularly to
be heard on the 22nd day of November, 1948, and
the Court having heard the evidence therein, and
having heretofore made its findings of fact and
conclusions of law, upon the said findings and con-
clusions,

It Is Hereby Ordered, Adjudged and Decreed as
follows:

1. That service of summons herein on defendant
Gravely Motor Plow and Cultivator Company be
quashed and said action be and the same is hereby
dismissed as to said defendant Gravely Motor
Plow and Cultivator Company.

2. That plaintiff take nothing by reason of its

complaint against defendant Gravely-Pacific, Inc., and said defendant Gravely-Pacific, Inc., have judgment denying the prayer of plaintiff's complaint, and for costs of this action, and have execution therefor.

Dated at Washington, D. C., this 18th day of July, 1949.

/s/ ROGER T. FOLEY,

United States District Judge.

Approved as to form only.

CARROLL, DAVIS &

FRIEDENRICH,

Attorneys for Plaintiff.

[Endorsed]: Filed July 26, 1949.

Entered in civil docket July 27th, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A NEW TRIAL
AND TO ALTER OR AMEND JUDGMENT

To the Honorable United States District Court for the Northern District of California, Southern Division, and to the Honorable Roger T. Foley, Judge Thereof, and to Messrs. Heller, Ehrman, White & McAuliffe, Attorneys for Defendants:

Please take notice that the plaintiff herein will move the above-entitled court to vacate and set aside the judgment of the court heretofore made and entered in favor of the defendants and against the plaintiff in the above-entitled action, and to grant the plaintiff a new trial herein and to alter

or amend the said judgment, upon the following grounds:

1. Insufficiency of the evidence to justify or support the judgment;
2. That the judgment is against the law;
3. Errors in law occurring at the time of trial and excepted to by plaintiff;
4. Irregularities and errors in the Findings of Fact and Conclusions of Law upon which said judgment is based;
5. Insufficiency of said Findings of Fact and Conclusions of Law;
6. Failure of the Court to make a determination of all of the issues presented at the trial of said cause;
7. That the granting by the Court of the motion of defendant Gravely Motor Plow and Cultivator Company for an order to quash service of summons on said defendant and to dismiss plaintiff's action as to said defendant was erroneous, not supported by the evidence, and is contrary to law.

Said motion will be made and based upon the minutes of the said Court, and upon the papers and records on file with the above-entitled Court in said cause.

Dated: August 4, 1949.

CARROLL, DAVIS &
FREIDENRICH,

Attorneys for said Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed August 5, 1949.

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

Case No. 27114 H

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVA-
TOR COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC, INC.,
a Corporation, FIRST DOE COMPANY,
SECOND DOE COMPANY and THIRD DOE
COMPANY, corporations,

Defendants.

DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 4, 1949, plaintiff, H. V. Carter Co., Inc., served its "Notice of Motion for a New Trial and to Alter or Amend Judgment." The judgment referred to was entered July 26, 1949, and was in favor of defendants Gravelly Motor Plow and Cultivator Company, a corporation, hereinafter called "Gravelly," and Gravelly-Pacific, Inc., a corporation, hereinafter called "Pacific."

At an early stage of the proceedings, defendant "Gravelly" moved for an order to quash the service of summons and to dismiss the action as to said defendant "Gravelly." The order of Judge Harris denying said motion was entered June 20, 1947. The

answer of "Gravely," filed October 8, 1947, and each of the amended answers subsequently filed, urged by way of separate defense the question of the validity of the service upon "Gravely" and the jurisdiction of the Court of the person of "Gravely." At the beginning of the trial and again at the conclusion thereof, the motion to quash service of summons was renewed.

The case was tried and briefed upon the theory that the question of the jurisdiction of the person of "Gravely" was properly before the Trial Judge. The propriety of reviewing the decision of Judge Harris was not raised by counsel for any of the parties.

Upon the hearing of the Motion for a new trial and to alter or amend Judgment, the Court suggested to counsel the possibility that Judge Harris' prior ruling on the motion to quash service had become the "law of the case."

The power to review the order of Judge Harris was not within the province of the Trial Judge, no question as to jurisdiction of the subject matter being involved. *Commercial Union of America v. Anglo-South American Bank*, 10 F.2d 937; *Oglesby v. Attrill*, 14 F. 214. The Trial Judge, while holding to the opinion that the Court has no jurisdiction of the person of "Gravely," abdicates in deference to the views of Judge Harris.

From a review of the record in considering plaintiff's "Motion for a New Trial and to Alter or Amend Judgment," it appears that a judgment against "Gravely" on the merits ought to be rend-

ered upon the present state of the record. The case was well and fully tried. It is likely that counsel would agree that no additional evidence could be procured. It seems that nothing would be accomplished by a new trial.

Rule 59, Federal Rules of Civil Procedure, provides that: "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Under Rules 52(b) and 59(a), findings may be amended and a judgment may be entered against "Gravely."

This Court does not entirely agree with the views of Judge Yankwich expressed on this subject in *Brooks Bros. v. Brooks Clothing of California*, 5 F.D.R. 14. However, there is a distinction here. There has been no judgment entered in this case to this time against "Gravely" on the merits.

The record here indicates that during the years plaintiff performed services for the defendant "Gravely," a continuing dealer relationship existed either by express contract or by the conduct of the parties throughout the terms of and after the expiration of the written contracts. These services were beneficial to the interests of "Gravely" and the parties understood that said services were to be paid for. Throughout the years, plaintiff served said defendant as a sales agent and advanced the interests of the defendant and publicized the merits of its product, serviced its machines, instructed "ul-

ultimate purchasers'' in the use of same, and performed other services. Such services were not gratuitous and were worthy of compensation. The discount system shown by the record was a method of determining and making that compensation. The orders for 122 tractors, the subject matter of this action, were the result of solicitation by the plaintiff with the knowledge, consent and at the request of the defendant. Plaintiff at all times was ready, willing and able to pay the manufacturer's "list price" of each of the tractors ordered at the time or before delivery was to be made. If defendant decided to refuse these orders it was within its right in such refusal, but defendant must compensate plaintiff for services rendered and an accurate and fair measure of that compensation is on the basis of the "discount." *Taylor Manuf'g Co. v. Hatcher Manuf'g Co.*, 39 F. 440; *Gantner & Mattern Co. v. Hawkins*, 201 P.2d 847, holding that "a principal cannot deprive his agent of commissions on goods ordered through agent by discharging him before the orders are filled."

Restrictions in manufacture and distribution of products brought about by World War II was "Gravely's" often expressed excuse for not making reasonable deliveries. During the war years plaintiff had been urged to continue its services and particularly to continue its solicitation for ultimate purchasers and orders. The record here discloses that after the abating and lifting of war restrictions, "Gravely" increased production and manufacture and instead of respecting its obligations

with plaintiff, forwarded to its subsidiary "Pacific" more than 122 tractors. The record discloses various excuses for "Gravely's" failure to make deliveries to plaintiff including claimed failure on the part of the plaintiff to comply with newly made regulations by "Gravely," but circumstances appear in the record which may also be considered as a motive for this failure of delivery. "Pacific" was to receive a discount of 40%. All the capital stock of "Pacific" is owned by "Gravely" except three shares. These circumstances may or may not have influenced "Gravely's" determination to refuse delivery.

The Court, having examined the proofs offered by the respective parties, now finds the facts and states conclusions of law as follows:

Findings of Fact

1. That plaintiff is now, and since 1936 has been, a corporation organized under the laws of the State of California.

2. That defendant Gravely Motor Plow and Cultivator Company, hereinafter called "Gravely," is now, and at all times hereinafter mentioned has been, a corporation organized under the laws of the State of West Virginia.

3. That a dismissal has been entered as to defendant Gravely Motor Plow and Tractor Co., Inc.

4. That Gravely-Pacific, Inc., hereinafter called "Pacific," is now, and since on or about December 30, 1944, has been, a corporation under the laws of the State of West Virginia, doing business in the State of California.

5. That all the capital stock of "Pacific" is owned by "Gravely" except three shares, one of which is owned by D. Ray Hall, President of both corporations; one share owned by Sybil Hall, wife of said D. Ray Hall, and Vice-President of "Pacific"; and one of said three shares is owned by Kenneth Thomas, Treasurer of "Pacific" and Secretary of "Gravely"; that the officers of the two corporations are as follows:

"Gravely"—

President	D. Ray Hall
Vice-President	A. D. Williams
Secretary	Kenneth Thomas
Treasurer	V. D. Tippet
Counsel	A. G. Thompson

"Pacific"—

President	D. Ray Hall
Vice-President	Sybil Hall
Secretary	A. G. Thompson
Treasurer	Kenneth Thomas

That the auditor of "Gravely" is R. C. P. Waicher of Charleston, West Virginia; that the books and accounts and reports of "Gravely" are kept in Dunbar, West Virginia; that the auditor of "Pacific" is George Brun of Pasadena, California; that the books and accounts of "Pacific" are kept in Los Angeles, California; that the income tax returns of "Gravely" and "Pacific" are made separately.

6. That plaintiff for many years has been and now is engaged in the business of distribution, sales and service of farm and garden tractors and similar kinds of supplies and equipment.

7. That the alterations and improvements made by plaintiff in its business establishment in San Francisco were permanent in nature and were being used at the time of the commencement of this action for the distribution, sales, service and display of tractors, supplies and equipment other than those manufactured or sold by either of the defendants.

8. That plaintiff was not at any time a dealer or agent of "Pacific."

9. That the exclusive agency created by the contract of December 7, 1925 (Exhibit I), ceased to exist after January 14, 1935, and that thereafter and until the contract of November 7, 1940 (Exhibit P), was entered into, the plaintiff was not an exclusive dealer in the products of "Gravely."

10. That the contract of November 7, 1940 (Exhibit P), expired January 1, 1942, and from January 1, 1942, no exclusive dealership relation existed between plaintiff and "Gravely."

11. That at all of the times the orders for 122 tractors, the subject matter of this action, were forwarded to "Gravely," the plaintiff was a non-exclusive dealer in "Gravely" products and continued as such dealer until August 23, 1946.

12. That the said orders for 122 tractors were

placed by plaintiff with defendant "Gravely" between the beginning of World War II and August 23, 1946.

13. That the said orders for 122 tractors were accepted by "Gravely" with the qualifications that deliveries would be made as soon as conditions created by the War would permit.

14. That plaintiff during all of the time it was a dealer of "Gravely" products, including the period during which the said orders for 122 tractors were placed with "Gravely," performed services for "Gravely" as such dealer at its request as follows: Advertised "Gravely" products; solicited and made sales of "Gravely" products; serviced machines and carried repair parts; maintained service shop; employed salesmen and servicemen; followed up prospect lists and leads sent by "Gravely"; made demonstrations of "Gravely" products to prospective purchasers; assembled and serviced new machines sent by "Gravely"; transported machines to destination and instructed purchasers in the operation of machines and exhibited "Gravely" products at various fairs and floral shows including the State Fair at Sacramento, California; and other similar services.

15. That all of said orders for 122 tractors were for "ultimate purchasers," persons who had agreed to purchase the tractors from the plaintiff.

16. That after restrictions occasioned by the War were alleviated or removed, "Gravely," in the years

1945, 1946 and 1947, shipped to "Pacific," its California distributor, more than 122 tractors.

17. That "Gravely" failed and refused, and continues in such failure and refusal, to make deliveries to plaintiff of any of the said 122 tractors ordered by plaintiff.

18. That all the said orders for 122 tractors were orders placed with plaintiff by "ultimate purchasers" and forwarded by plaintiff to defendant "Gravely."

19. That plaintiff was at all times, since the placing of said orders, ready, able and willing to pay defendant "Gravely" its "list price" for each of the 122 tractors ordered; and that said "list price" for each of said tractors was at least \$300.00.

20. That by custom and agreement of many years' standing and existing at the time of forwarding said orders for 122 tractors by plaintiff to defendant "Gravely," plaintiff was to be compensated for the services described above in Finding No. 14 in the form of and by means of a discount of 30% from defendant's "list price," said list price to be paid by plaintiff to defendant "Gravely" before delivery.

From the foregoing facts the Court concludes:

Conclusions of Law

1. That plaintiff is entitled to recover from defendant Gravely Motor Plow and Cultivator Company, a corporation, for each of said 122 tractors

ordered by plaintiff, 30% of \$300.00, or the sum of \$10,980.00, and its costs.

2. That plaintiff take nothing from Gravely-Pacific, Inc., a corporation.

Let Judgment Be Entered Accordingly.

Dated: This 10th day of March, A.D., 1950.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed March 11, 1950.

In the District Court of the United States In and
for the Northern District of California, South-
ern Division

No. 27114 H

H. V. CARTER CO., INC.,

Plaintiff,

vs.

GRAVELY MOTOR PLOW AND CULTIVA-
TOR COMPANY, a Corporation, GRAVELY
MOTOR PLOW AND TRACTOR CO., INC.,
a Corporation, GRAVELY-PACIFIC INC., a
Corporation, FIRST DOE COMPANY, SEC-
OND DOE COMPANY and THIRD DOE
COMPANY, Corporations,

Defendants.

JUDGMENT

The above-entitled cause coming on regularly to
be heard on the 22nd day of November, 1948, and

the court having heard the evidence herein and having heretofore made its findings of fact and conclusions of law, upon the said findings and conclusions,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

(1) That plaintiff have and is hereby awarded judgment against defendant Gravely Motor Plow and Cultivator Company, a corporation, in the sum of Ten Thousand Nine Hundred Eighty Dollars (\$10,980.00), with interest thereon at the rate of seven per cent (7%) per annum from the date of entry of this judgment, and for its costs of suit, and have execution therefor.

(2) That plaintiff take nothing from defendant Gravely-Pacific, Inc., a corporation, and that said defendant have and recover its costs of suit from plaintiff herein.

Dated at Reno, Nevada, this 20th day of March, 1950.

/s/ ROGER T. FOLEY,

United States District Judge.

Approved as to form:

/s/ SAMUEL S. STEVENS.

HELLER, EHRMAN, WHITE &
McAULIFFE.

Attorneys for Defendants.

Entered in Civil Docket March 21, 1950.

[Endorsed]: Filed March 21, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION TO ALTER, AMEND
AND MAKE ADDITIONAL FINDINGS OF
FACT AND CONCLUSIONS OF LAW AND
TO AMEND JUDGMENT ACCORDINGLY

To the Honorable United States District Court for
the Northern District of California, Southern
Division, and to the Honorable Roger T. Foley,
Judge Thereof, and to H. V. Carter Co., Inc.,
Plaintiff and Messrs. Carrol, Davis & Freiden-
rich, Its Attorneys:

Please take notice that defendants herein will
move the above-entitled court to vacate and set aside
the judgment of the court heretofore made and en-
tered in favor of the plaintiff and against defendant
Gravelly Motor Plow and Cultivator Company in the
above-entitled action, and to alter, amend and make
additional findings of fact and conclusions of law
and to amend said judgment accordingly, upon the
following grounds:

I.

The judgment is contrary to and unsupported by
the evidence.

II.

The judgment is contrary to and unsupported
by law.

III.

The judgment is contrary to the law and evidence,
and judgment should have been rendered in favor
of defendants.

IV.

Irregularities, omissions, errors and inconsistencies in the findings of fact and conclusions of law upon which said judgment is based.

V.

Insufficiency of the findings of fact and conclusions of law to support the judgment.

Said motion will be made and based upon the minutes of said court, and upon the papers and records on file with the above-entitled court in said cause.

Dated: March 30, 1950.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Defendants.

[Endorsed]: Filed March 30, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL
TO COURT OF APPEALS

Notice is hereby given that Gravely Motor Plow and Cultivator Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of March, 1950.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE &
McAULIFFE,

Attorneys for Appellant, Gravely Motor Plow and Cultivator Company, a Corporation.

[Endorsed]: Filed November 14, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Gravely Motor Plow and Cultivator Company, a Corporation, Defendant herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered March 21, 1950, by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of Maryland, a corporation duly organized and exist-

ing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Gravely Motor Plow and Cultivator Company, a Corporation, Appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefore against it and award execution therefor.

Signed, Seal and Dated this 13th day of November, 1950.

[Seal]

FIDELITY AND DEPOSIT

COMPANY OF MARYLAND,

By /s/ CARL H. KUHN,

Attorney in Fact.

Attest:

/s/ S. CLIMO,

Attesting Agent.

State of California

City and County of San Francisco—ss.

On this 13th day of November, A.D. 1950, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Carl H. Kuhn, Attorney-in-Fact, and S. Climo, Agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the Attorney-in-Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-Fact and Agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

/s/ BELLE JORDAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Nov. 9, 1952.

[Endorsed]: Filed November 14, 1950.

[Title of District Court and Cause.]

ORDER ON MOTION OF DEFENDANTS TO
ALTER, AMEND AND MAKE ADDI-
TIONAL FINDINGS OF FACT AND CON-
CLUSIONS OF LAW AND TO AMEND
JUDGMENT ACCORDINGLY

Defendants' motion to vacate and set aside the Judgment of the Court heretofore made and entered in favor of plaintiff and against defendant Gravely Motor Plow and Cultivator Company in the above-entitled action, and to alter, amend and make additional findings of fact and conclusions of law, and to amend said Judgment accordingly, having been submitted by the parties and considered by the Court.

It Is Hereby Ordered that said motion be, and the same hereby is, denied in its entirety.

Dated: This 16th day of October, A.D., 1950.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed October 18, 1950.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S MOTION TO
AMEND THE FINDINGS OF FACT BY
MAKING AN ADDITIONAL FINDING OF
FACT

Plaintiff's motion to amend findings of fact heretofore made in the above-entitled action on the 10th

day of March, 1950, by making an additional finding of fact as follows, to-wit:

“That defendant ‘Gravely’ was at the time of the commencement of this action and the issuance of process therein and had been prior thereto doing business within the state of California.”

having been submitted by the parties and considered by the Court,

It Is Hereby Ordered that said motion be, and the same hereby is, denied.

Dated: This 16th day of October, A.D., 1950.

/s/ ROGER T. FOLEY,

United States District Judge.

[Endorsed]: Filed October 18, 1950.

In the Southern Division of the United States District Court for the Northern District of California

No. 27,114

H. V. CARTER COMPANY,

Plaintiff,

vs.

GRAVELY MOTOR PLOW & CULTIVATOR COMPANY,

Defendant.

Before: Hon. George B. Harris, Judge.

REPORTER'S TRANSCRIPT
HEARING ON MOTION TO QUASH

Monday, June 9, 1947

The Clerk: H. V. Carter vs. Gravelly Motor Plow & Cultivator Company.

The Court: Do you have a witness?

Mr. Freidenrich: Yes. I also ask leave to file a Supplemental Answer.

The Court: You have certain motions, Counsel?

Mr. Freidenrich: Yes. I will file it after. I will call Mr. Graves. [1*]

DAVID E. GRAVES

called as a witness by the plaintiff; sworn.

The Court: This witness is being offered on the motion to quash?

Mr. Freidenrich: Yes, your Honor.

* Page numbering stamped at top of page of original Reporter's Transcript.

(Testimony of David E. Graves.)

Direct Examination

By Mr. Freidenrich:

Q. Mr. Graves, you are the president of H. V. Carter Company, a corporation? A. I am.

Q. Which is the plaintiff in this case?

A. Correct.

Q. Are you the general manager of the plaintiff company, as well as its president? A. I am.

Q. Do you see all correspondence coming in to the company from manufacturers and the people whom the company does business with?

A. Except when I am away from the office.

Q. Except when you are away from the office?

A. Yes.

Mr. Freidenrich: I wonder if counsel would stand up here with me, because I have a batch of correspondence that I would like to introduce for identification.

Q. I will show you a document and ask you if you have seen that before. A. I have. [2]

Q. Did that come from your files?

A. It did.

Q. You gave that to me from your correspondence files? A. I did.

Q. I show you the back, here, and refer you to a stamp and ask you if that is your stamp?

A. I received it and initialed it.

Q. That is your stamp showing the date you received it, and you put your initials on it?

A. That is correct.

(Testimony of David E. Graves.)

Q. This is entitled, "Gravely Bulletin"?

A. It is.

Q. Where did you receive this from?

A. Dunbar, West Virginia.

Q. From the Gravely Motor Plow & Cultivator Company?

A. It came in their envelope.

Q. Is it their practice to send bulletins from time to time?

A. That is typical of the bulletins we always receive.

Q. And their policy?

A. That is correct.

Mr. Freidenrich: I would like to offer this in evidence.

The Court: It may be received.

Mr. Clifford: No objection.

(The bulletin to which reference last was made was [3] marked Plaintiff's Exhibit 1.)

Q. (By Mr. Freidenrich): I show you another document and ask you if you have seen that before.

A. I have.

Q. Is that also a Gravely Bulletin that you received in the mail from the Gravely Company at Dunbar, West Virginia?

A. Correct.

Q. Is this your receivable stamp and your initials?

A. Yes.

Q. Attached to it is a carbon copy of a letter that you wrote?

A. Correct.

Q. To Mr. Hall, of the Gravely Company?

(Testimony of David E. Graves.)

A. Yes.

Q. On your carbon copy is typewritten in green ink something. Can you explain that?

A. It is customary when we receive a letter treating on several different subjects to make an extract from that letter to either type it on the copy of the letter to which it refers, or to make an extract on another piece of paper and attach it to the company. In this instance this extract from the letter of the Gravely Motor Plow & Cultivator Company was typed on there, and I did it, myself.

Q. When did you do that?

A. I couldn't tell you the exact date, but this letter was [4] received by me on August 7th, and it is customary to——

The Court: August 7th; what year?

A. 1945. Note that this bulletin was received with—it refers to this letter—this letter refers to that, and this one is on August 17 that I wrote this on there, an abstract from their letter of August 10th, 1945, received by us on August 17, 1945.

Q. (By Mr. Freidenrich): Well, the point is you wrote this on there at or about the time you wrote this letter of which this is a copy, carbon copy to the company? A. Yes.

Mr. Freidenrich: We would like to offer this in evidence, if your Honor please.

The Court: It may be received and appropriately marked.

The Clerk: For the sake of the record, the other one was Plaintiff's 1; this is Plaintiff's Exhibit 2.

(Testimony of David E. Graves.)

Mr. Freidenrich: Yes.

The Court: I would suggest, in the interest of time, that counsel have an opportunity to examine them first.

Mr. Freidenrich: That is what he is doing.

The Court: And to offer them as one exhibit and have them identified as such.

Mr. Freidenrich: While counsel is doing that, your Honor, I would like to take a moment to read one paragraph from this exhibit that I introduced. This is the Bulletin exhibit. It [5] is not dated, but the date of the receivable stamp on it was August 7, 1945.

“To All Agents:

“Bulletin No. 30. Subject: This letter will be quite brief considering the importance of the subject mentioned herein. You doubtless are aware of our plan for dividing the U. S. into sections and to establish a branch in each of these sections. You are in the section to be handled through the following branch: Gravely Pacific, Inc., 4346 Colfax Avenue, North Hollywood, California.”

Q. Mr. Carter, I show you a batch of correspondence and will ask you if you will identify those and state whether or not those came from your files. A. Yes.

Q. Do they constitute the correspondence from Gravely Motor Plow & Cultivator Company, or Gravely Pacific, Inc., to H. V. Carter Company, or Bulletins from Gravely Motor Plow & Cultivator

(Testimony of David E. Graves.)

Company, and carbon copies of your replies to the respective companies? A. That is the case.

Q. Do they include anything else that you recall that I did not recall?

A. Price lists in there.

Q. Price lists attached to their letters which set out price lists, things of that nature, but they are all communications from those companies to H. V. Carter? [6] A. Correct.

Q. You recognize, of course, the signatures on these letters to you? A. I do.

Mr. Freidenrich: We would like to offer these in evidence as a group.

The Court: They may be received and marked as one exhibit.

(The documents last referred to were marked Plaintiff's Exhibit 3.)

The Court: No objection to these, Counsel?

Mr. Clifford: No objection.

Mr. Freidenrich: I think that is all, your Honor. I would like to say I neglected to have an affidavit from a witness who is out of town, that is not in, but it has been promised to us, so if I could have about two or three days——

The Court: The matter will stand submitted, then, when, as and if that affidavit is received.

The Clerk: Make it one week.

Mr. Freidenrich: The matter will go over one week?

The Clerk: Until next Monday for submission.

(Testimony of David E. Graves.)

Mr. Clifford: At that time may I make any remarks as to the correspondence that was submitted today that I wish?

The Court: You may. Do you have any additional comment to make at this time, gentlemen?

Mr. Freidenrich: Not with respect to the law, your Honor. [7] I think the law is clear. I think each case has to be determined by its own set of facts, and I don't have any further authorities to submit, but I do think the evidence submitted is conclusive to show the Gravely Pacific, Inc., is in fact a branch and a part of Gravely Motor Plow & Cultivator Company, and they are not separate and distinct, except in a corporate sense.

Mr. Clifford: I will reply to that when he has concluded his case.

The Court: One week, gentlemen.

[Endorsed]: Filed January 27, 1951.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Monday, November 22, 1948, 2:00 P.M.

Appearances:

For Plaintiff:

FRANCIS CARROLL, ESQ. and
DAVID FREIDENRICH, ESQ.

For Defendants:

F. WHITNEY TENNEY, ESQ. and
EUGENE S. CLIFFORD, ESQ.

(Following opening remarks by counsel, the following testimony was taken:)

DAVID E. GRAVES

called as a witness on behalf of plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. David E. Graves.

Direct Examination

By Mr. Carroll:

Q. Mr. Graves, where do you reside, please?

A. Alameda, California.

Q. Will you tell the court, please, what your connection is with the H. V. Carter Co., Inc., the plaintiff in this action?

A. President and general manager.

(Testimony of David E. Graves.)

Q. I believe you have been resident and general manager since the incorporation of this company?

A. I have.

Q. And it was incorporated, I believe, in 1936, is that correct?

A. Correct.

Q. Was there a predecessor company of the corporation?

A. There was H. V. Carter Company.

Q. That was an unincorporated business, was it not?

A. It was.

Q. Will you tell the court what, if any, was your position with the H. V. Carter Co.?

A. I was sales manager for the company from 1917 to approximately [2*] 1922, when I became manager.

Q. And you were manager of that company from 1922 until the incorporation in 1936, is that correct?

A. That's correct.

Q. Will you tell the court, please, Mr. Graves, whether the H. V. Carter Co. is a representative of the Gravely Motor, Plow & Cultivator Company in California?

A. It was.

Q. And the Gravely Motor Plow & Cultivator Company that is sometimes called the Gravely Company is a company which manufactures farm equipment, is that correct?

A. Garden tractors.

Q. What is the general nature of your business, please?

A. The distribution, sales and service of equipment of that nature.

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of David E. Graves.)

Q. Did the Carter Company, the unincorporated company, and the H. V. Carter Co., Inc., the present plaintiff, represent the Gravely Motor Plow & Cultivator Company? A. They did.

Q. Can you tell the court, please, when that relationship began?

A. It began prior to 1925. [3]

* * *

Q. Now, Mr. Graves, what territory did you cover—and when I say you, I mean your company—for the Gravely Company?

A. The northern part of California.

Q. Can you tell us what your obligations were as agent? What did the company do for the Gravely Company in this area?

A. Follow the normal course of procedure in merchandising, which was advertising, sales work, financing, servicing, and carrying necessary repair parts, maintaining of service shop, and salesmen, as well as service men, and also demonstrators, and apparatus for taking machines about.

Q. Did you handle complaints for the Gravely Company in West Virginia from users out here that might be forwarded to the [5] Gravely Company in West Virginia?

A. If there were any, yes, sir.

Q. And did you, during this period of time, handle such complaints?

A. Well, I would say so.

Q. Did you have any duties or obligations in regard to prospect lists sent to you by the Gravely Company in West Virginia?

(Testimony of David E. Graves.)

A. Yes, of course, it was our obligation to follow them up and reply to them, and have them called on by our salesmen, and give them demonstrations as conditions warranted.

Q. Over the period of years, did they send you a large number of prospect lists?

A. Yes, they did.

Q. I hand you here, Mr. Graves, some sizable list of sheets of paper entitled, "Valuable sales leads," and I think all of these bear on the back of them the Carter Company name, and date—they seem to be in April and May of 1942. Will you tell us if these are typical of the prospect lists sent to you by the Gravely Company?

A. Yes, these are typical. However, in some cases they send us the original correspondence and then with the notations, "Referred to us," and sometimes a notation as to following them up.

Q. You received these during the course of years, did you? A. Yes, sir. [6]

Q. I notice each one of these—one is three names, two names, one name, one name; but at all events that was part of the duties of the Carter Company, was it? A. Yes, sir.

Q. Were you required to maintain any repair facilities? A. Yes, we were.

Q. Did you service these tractors throughout Northern California when they needed it?

A. Yes, sir, we did.

Q. How about parts? Where were parts maintained in California for these tractors?

(Testimony of David E. Graves.)

A. 52 Beale Street, which is our principal place of business.

Q. You were required to maintain those parts and stock?

A. It was a natural procedure in business and the factory expected us to do it.

Q. Did you have any duties in connection with the new machines when they were sent to the ultimate purchasers on farms or gardens, wherever they might be?

A. We saw first that they were properly assembled and serviced regularly until wartime, when we couldn't do it because of lack of gasoline and rubber tires. So we took the machines to destinations and delivered them and instructed the owner in the operation of them.

Q. Did you ever exhibit the Gravely tractor in California? A. Meaning what?

Q. Well, did you show it in fairs or anything of that sort? [7]

A. Oh, yes, various fairs, floral shows—always at the State Fair at Sacramento.

Q. By the way, this is not a large tractor, is it?

A. No, sir.

Q. Would you give us its approximate selling price at the present time?

A. I am not familiar with the current price, but a combination outfit—I think the factory list price was a little less than \$300, plus the attachments. I would say \$285 or ninety dollars, list price, factory.

Q. You told us this representation started about

(Testimony of David E. Graves.)

1925—oh, by the way, another thing I wanted to bring out: What was the machinery you were ordering these tractors, or by which you were ordering these tractors from the Gravely Company—what did you do?

A. We have a regular purchase order form, of which we keep one copy—two copies in reality, one in a purchase order binder; another going into our purchase order file; the original or white company going to the Gravely Company.

Q. Who was the purchaser of the product from the Gravely Company?

A. We purchased the machines.

Q. In other words, the transaction is not directly between the ultimate man on the farm and the Gravely Company; you place the order, is that right, and purchase it? [8]

A. That was the regular procedure.

Q. Tell the court how you paid for those.

A. They were paid by what is commonly called sight draft against bill of lading. We paid for them when the draft attached to the bill of lading was presented to us through the bank.

Q. And they drew against you, as I understand it, as soon as the material was put on board back there in West Virginia?

A. That would be the procedure.

Q. Did you give the Gravely Company the name of the person to whom you intended to make the sale?

A. We wrote them the name on the purchase

(Testimony of David E. Graves.)

order at the time the purchase order was made out.

Q. Was that by requirement of your principal, the Gravely Company? A. It was.

Q. Now, I hand you here what purports to be a carbon copy of a purchase order dated April 20, 1945, directed to Gravely Company, at Dunbar, West Virginia, and I ask you if that is the same type of order that you have just been testifying about? A. That is a typical order.

Q. I hand you here a post card addressed to H. V. Carter Company, Inc., signed by Gravely Motor Plow & Cultivator Company, and ask you if that is an acknowledgment of that and some other orders.

A. That is an acknowledgment of this particular order and [9] those others whose names are mentioned on there.

* * *

Q. Your compensation for this representation came in what form?

A. A discount or commission deducted from the invoice. [10]

Q. You were not paid in any other manner for the services you performed, is that correct?

A. That's correct.

Q. Directing your attention to the war years, beginning 1942, '43, '44 and '45, was there any change in the services which you rendered to your principal, the Gravely Company, during those war years—directing your attention for the moment

(Testimony of David E. Graves.)

to matters apart from actual selling or merchandising of the machine?

A. Of course, the demands on service and rebuilding machines for the owners, putting them in operating condition, was more acute during the war period than prior to wartime, because of the inability to get new equipment, and our service demands were greater; but of course, the urge was to keep the customers or the prospects, keep the customers satisfied by doing all the service work we could for them, and keeping the prospects in line and available to the Gravely equipment, so when the time of delivery came they would be sure to accept their order.

The Court: You mean by service, repairs and servicing parts? A. Yes, your Honor.

Q. (By Mr. Carroll): Did you receive any instructions from the Gravely Company along those lines during the early war years?

A. About the service?

Q. Yes, about your general relationship with the people who [11] owned this Gravely equipment.

A. Well, of course, there were numerous bulletins that came through regarding the service work to be done, to maintain our relationship as Gravely distributors favorable with the prospects and favorable with the owners.

Q. I haven't asked you this before, but did Gravely advertise directly in this general area?

A. They used magazines of general circulation

(Testimony of David E. Graves.)

and they had quite a comprehensive and elaborate, I would say, method of circularizing prospects.

Q. Do you know whether that advertising on behalf of defendant Gravely Company was discontinued during the war?

A. I think not. Well, I am quite sure it was not, because I wrote them at one time asking why, if tractors were not available, they continued such expensive advertising, and they replied it was very important to advertise in order to keep the Gravely name before the public.

Q. It was more difficult to secure tractors from the Gravely people, was it? A. Sir?

Q. It was more difficult to secure tractors from the Gravely people? A. It was.

Q. Were you ever told to discontinue selling during the war?

A. Not to my knowledge. [12]

Q. Did they discontinue sending you prospect lists during the war? A. They did not.

Q. Did they give you any instructions with regard to selling the Gravely tractors during the war?

A. Well, there was a continual urge by letters and bulletins to make our best efforts to sell tractors and to sell for the future. I remember that was quite an appropriate slogan, "Sell for the future."

Q. Did you take orders in 1943, '44 and '45 and '46 for Gravely tractors? A. We did.

Q. Did you order those tractors, yourself, in

(Testimony of David E. Graves.)

turn from the Gravely Company? A. We did.

Q. Is that by the same form you ordered them in the years before the war?

A. That's correct.

Q. It has been stipulated here between counsel and myself, Mr. Graves, that the number you ordered within the two and a half years prior to the filing of this complaint was approximately 122, is that correct, to the best of your knowledge?

A. To the best of my knowledge.

Mr. Tenney: Pardon me, Counsel, I don't believe it was the stipulation. It was an admission we were making in the [13] answer at the time we were discussing the answer, but that is unimportant.

The Court: It amounts to the same thing.

Mr. Tenney: Yes, we admit the order had been placed.

Q. (By Mr. Carroll): And that included the order for the carload of tractors according to the complaint on July 3, 1946, is that correct?

A. It is.

Q. What were you told in regard to delivery on those orders as you placed them? Let me bring out one other fact, first—these orders were not placed all at once? A. No, they were not.

Q. You sent them in from time to time?

A. That's correct.

Q. And the order you placed was an order for the delivery of the tractors to yourself, is that correct? A. Correct.

(Testimony of David E. Graves.)

Q. What were you told by the Gravely people in regard to any delivery of those orders?

Mr. Tenney: Is this orally or in writing?

Mr. Carroll: Either way, counsel.

The Witness: Well, the replies were hardly ever encouraging as to immediate delivery, and almost always as to sometime in the future. There were acknowledgments that came through, or, rather, copies of letters to the customers in [14] which they suggested possibly 90 days.

* * *

Q. (By Mr. Carroll): I notice on this Plaintiff's Exhibit No. 2 that the card signed by the Gravely Motor Plow & Cultivator Company says, "Our formal acknowledgment has been sent to the new buyers you report to us who are——" Is that the letter to the buyer you refer to? A. It is.

Q. Did you receive an acknowledgment of this sort in the form of a card in regard to the 122 orders, including the carload order of 45? Did you receive an acknowledgment from the Gravely Motor Plow & Cultivator Company as to those orders?

A. It is a broad question, but if it has to be "Yes" or "No" I would say yes.

Q. Let me ask you this: Did you receive this form of acknowledgment which appears on this order dated 4/20/45 as to these orders?

Mr. Tenney: As to what orders, the 122? [15]

Mr. Carroll: Yes.

Mr. Tenney: All of them?

Mr. Carroll: Yes.

(Testimony of David E. Graves.)

The Witness: May I qualify that just a little?

Mr. Carroll: You can answer it any way you want, Mr. Graves.

A. That postcard is a notation to us that they had received that order and had acknowledged that order to the buyer whose name we gave on our order, and I would say that being the general practice that there should have been a card received for each order we sent. I may go a little farther than that——

Q. Yes.

A. You will notice that post card stipulates three orders we sent in, so that would appear on one of our purchase order blanks. We couldn't have one for all three.

Q. I take it the point you make is that this acknowledgment, here, is attached to an order which refers to only one ultimate buyer, whereas the card acknowledges orders as to several ultimate buyers.

A. That is correct.

Q. Now, will you tell his Honor, please, whether in the years from 1925 up to the year 1943 this was the same form of acknowledgment of your orders which you received?

A. To the best of my knowledge.

Q. Did you ever, during that period of time, from 1925 up to [16] 1943, '44 or '45, or during those years, receive any different form of acknowledgment of your orders?

A. As I said previously, occasionally we would

(Testimony of David E. Graves.)

receive a copy of the letter to the customer whose name we put on the order we sent to Gravely.

Q. Is it fair to state that the acknowledgment you received of the orders which you place, and I am referring now to this 122 orders, is that the same acknowledgment that you had received in all the preceding years from this company?

A. I believe so.

Q. Now, in regard to these particular orders for these 122 tractors, did the company tell you they would not accept any one of those orders?

A. Not to my knowledge.

Q. Did they tell you they would not ship any one of those orders? A. Not to my knowledge.

Q. Did they tell you that any of those orders had been canceled?

A. I do not think they did.

Q. Did you receive any treatment from the date of these orders that was any different from the treatment in the orders which you had sent to them in all the preceding years?

A. Well, yes, because there were different requirements in connection with orders. Some orders were agricultural orders. [17] some orders were industrial orders. Some orders were War Production Board orders, and those individual types of orders had to receive different treatment.

Q. Did you ever receive from this company these particular 122 machines which you ordered from them?

A. That group of sales orders was scrutinized

(Testimony of David E. Graves.)

very, very carefully, which we tabulated, and unless there was an error or oversight there are no orders tabulated there that we had received. [18]

* * *

Q. What was your commission on these orders?

A. 30 per cent.

Q. I asked you during the recess if you could compute for me what 30 per cent would be on a total of 122 of these Gravely tractors at the list price of \$350. Did you make that computation? At least, I saw you writing on a piece of paper out there.

A. Yes, I estimated that would be in the neighborhood of \$13,000.

Q. Do you have the exact figures there?

A. I took the basis of \$350, which I thought was a fair average. That, according to my calculation, should be \$42,700; or, on a 30 per cent basis, \$12,810. [19]

* * *

Q. When did you first hear of the Gravely Pacific Company, who is the co-defendant in this case?

A. Well, Mr. Hall wrote to us in the latter part of 1944 and first part of 1945, saying that he planned to come out here and establish a branch office in Southern California, and I believe it was the first part of 1945 he wrote saying he was anticipating making reservations so he could get here later in the year.

Q. And was a branch office set up in Southern California?

A. Mr. Hall phoned me in the matter, somewhere, I think it was July of 1945, saying he was in Los Angeles and would like to come up and talk

(Testimony of David E. Graves.)

with me about the overall program, and he had hoped to get up here, and if he couldn't get up here, could I go down there? I tried to get train reservations, but it was not possible to do so, and I was unable to get any gasoline, so it was not possible for me to go down there. I talked to Mr. Hall again by phone. He told me then he had [20] placed *his some* ads in papers there for men to enter our employ and establish this branch office, and if I could possibly get down he would like to have me do it, as he found his reservations wouldn't make it possible for him to get up here and get back in the meantime to take those up.

Q. Did he establish a branch office down there to your knowledge? A. Yes.

Q. Can you tell us approximately when that was? A. That was in 1945.

Q. And that office is still there at the present time, is it?

A. Well, it is in the Los Angeles area. I understand they moved from their original location in Glendale.

Q. Who was in charge of that office down here, so far as you know? A. Mr. Heinen.

* * *

Q. With whom did you deal after this branch office was opened?

A. We continued our dealings by and large with the Gravely Motor Plow & Cultivator Company at Dunbar.

(Testimony of David E. Graves.)

Q. That is in West Virginia?

A. That is in West Virginia.

Q. From whom did your responses come in regard to any communications you made since to the Gravely Company at Dunbar? [21]

A. Usually from Mr. Hall; and sometimes from Mr. Thomas.

Q. Were any of your letters sent back there ever answered out here?

A. Yes, occasionanny we would hear from Mr. Heinen in answer to our letters which indicated our letters had been sent out here.

Q. And if, as I understand you, Mr. Heinen would answer inquiries and correspondence which you sent back to Dunbar—is that correct?

A. That is correct.

Q. You, in other words, had dealing from both ends, both from Dunbar and from Los Angeles?

A. Yes, occasionally in writing to the Dunbar office I would send a copy down to Gravely Pacific Company, Mr. Heinen.

Q. Now, did Mr. Heinen come up here and call on you? A. Yes, he did.

Q. Did he have any discussions with you about your establishment and the type of premises that you had? A. Yes, he did. [22]

* * *

Q. One other question. As to these 122 tractors that you ordered and which you were going to purchase from the defendant Gravely Motor Plow &

(Testimony of David E. Graves.)

Cultivator Company, you have told us you were required to pay for those by a sight draft drawn against the bill of lading, is that correct?

Q. That was before you in turn collected from the person to whom you finally sold them?

A. Yes.

Q. Were you at all times ready, willing and able up to the time of the filing of this suit to pay for the tractors you had ordered in that group of 122?

A. Prior to the filing of the suit, yes.

Q. I hand you a letter here signed by Mr. Heinen, and I think you have identified him as the gentleman here in court who is in charge of the Los Angeles office, and I ask you if that is a letter you received from him.

A. Yes, I received that.

Mr. Carroll: We offer this in evidence.

Mr. Tenney: No objection, your Honor. [29]

The Court: It will be admitted in evidence as Plaintiff's Exhibit No. 3. [30]

* * *

Cross-Examination

Mr. Tenney: We will offer this stipulation in line with the Court's suggestion in order to save time: We will stipulate that Mr. Graves was a dealer in Gravely products in California, a non-exclusive dealer of those products in any portion of California after 1940, and with that stipulation we can avoid what we are going through. [56]

* * *

(Testimony of David E. Graves.)

Mr. Carroll: I would suggest this, if your Honor please: It is admitted apparently, regardless of counsel's stipulation, that this company has been the agent in Northern California since 1925, it and its predecessor company.

Mr. Tenney: It is admitted that they have been a dealer.

Mr. Carroll: And they were a dealer at the time they made these sales for which we have brought suit to recover here.

Mr. Tenney: That is correct, but our stipulation would be that they were a non-exclusive dealer. [58]

* * *

Q. (By Mr. Tenney): Mr. Graves, you know Mr. Heinen, who is in court? A. Yes.

Q. When did you first meet Mr. Heinen?

A. I think it was the latter part of 1945.

Q. Did you know at that time that Mr. Heinen was connected with Gravelly Pacific, Inc., a corporation? A. I did.

Q. You knew he was the managing agent of that corporation, did you not?

A. I understood so.

Q. And you continued to have dealings with Mr. Heinen from the time you first met him in 1940 up to the time you received the [66] letter from him of August 23, 1946, did you not?

A. Yes, we dealt with him.

* * *

Q. I will show you this letter dated April 12,

(Testimony of David E. Graves.)

1946. We will have no difficulty with this one. It is your signature, I am sure.

A. That is all right. [67]

* * *

Q. (By Mr. Tenney): Counsel has given me this letter, Mr. Graves. I will give it to you to read. I am sure you wrote it. It is out of your file.

A. Yes, sir.

Mr. Tenney: We offer this letter in evidence, your Honor.

The Court: It may be admitted.

Letter from John W. Heinen to D. E. Graves dated April 27, 1946, was received in evidence, marked Defendants' Exhibit S, and read.)

Q. (By Mr. Tenney): I now show you, Mr. Graves, a letter bearing your signature dated May 3, 1946, and ask you if you wrote that.

A. Yes, sir.

Mr. Tenney: We offer this in evidence, if your Honor please.

Mr. Carroll: No objection.

(Letter from D. E. Graves to Gravely Pacific, Inc., dated May 2, 1946, was received in evidence, marked Defendants' Exhibit T, and read.)

Q. (By Mr. Tenney): I now show you what purports to be a copy of a letter written to you by Mr. Heinen, Mr. Graves, dated May 9, 1946, and ask you if you received that letter. [68]

A. Yes, sir.

(Testimony of David E. Graves.)

Mr. Tenney: We offer this in evidence, if your Honor please, as defendants' next exhibit.

The Court: It may be admitted.

(Letter from John W. Heinen to D. E. Graves dated May 9, 1946, was received in evidence, marked Defendants' Exhibit U, and read.)

Q. (By Mr. Tenney): I show you a letter which your counsel has handed us, Mr. Graves, which is from Mr. Heinen to you dated June 1, 1946. I take it you received that letter?

A. Yes, sir.

Mr. Tenney: This letter, if your Honor please, is from the Gravely Pacific, Inc., dated June 1, 1946, addressed to H. V. Carter Company.

The Court: That is admitted as V, isn't it?

Mr. Tenney: Yes. I overlooked offering it.

(Letter from Gravely Pacific, Inc., to D. E. Graves, dated June 1, 1946, was received in evidence, marked Defendants' Exhibit V, and read.)

Q. (By Mr. Tenney): Mr. Graves, there is a "Buy in Advance" plan referred to.

A. Pardon me, Mr. Tenney. May I see the letter on which to comment when you are through with your questions?

Q. Do you want to see the letter again?

A. Yes, sir. Did you want to question me? [69]

Q. Go ahead and make a comment if you desire.

A. The one requirement in here, it appeared a

(Testimony of David E. Graves.)

number of times in the correspondence from the Gravely Company asking that we take deposits on the tractors and forward the deposits to the Gravely Company. That was not in harmony with our policy because we were in a period of very disturbed economy.

Q. Did you ever advise Mr. Heinen——

A. I did not advise Mr. Heinen, but I did advise Mr. Hall.

Q. How did you advise him, in writing or orally?

A. I am very sure that we wrote him.

Q. I would like to have a copy of any letter.

A. That we were not accepting any deposits from any customers on any merchandise for which we could not make delivery, because of the uncertainty of financial matters, and we did not want to operate on other people's money. We did not want the money involved with any funds of ours. Consequently our policy was not to accept any deposits on any orders which we were unable to fulfill and we did not carry any deposits.

Q. You feel quite certain you so advised Mr. Hall of this in writing?

A. I believe we did. That was our policy. We did not accept any deposits for the reason I mentioned, and we did not send any deposits to Mr. Hall, because we were financially able to pay for whatever they sent us without any cash deposits on them, and some of those people, as we understand, [70] who had made cash deposits, which

(Testimony of David E. Graves.)

were made, as I understand it, on the assumption that they were to be invested in something and the interest returned to the one who made the deposit, became quite involved, and we noticed in financial reports of different concerns often times that the amount in those financial statements of deposits of customers was greater than their cash on hand, which indicated they were not very liquid, and we did not want to become involved in any such financial position. Consequently we took no cash deposits.

On this plowing, we did contact our customers, the ones to whom we had sold. We sent them form letters and followup.

Q. Have you copies of those form letters that you sent? A. I would think so.

Q. If so, I would like to have those produced.

A. I would think so. Our men and salesmen were mechanics and we really were not in the plowing or contracting business. We were in the merchandising business.

Q. You were in the business of demonstrating Gravely products?

A. That is right. We would do that to a good prospect, a reasonable prospect. Yes, we would do that.

Q. You said something in the statement you just made here, the comment you were just making, about the difficulty of deliveries. You knew, did you not, Mr. Graves, very definitely that during the entire period of the war the production of the [71]

(Testimony of David E. Graves.)

Gravely factory was greatly curtailed, as well as many other factories, did you not?

A. I had no reason to know that because I did not visit the factory up to 1941.

Q. But you received bulletins throughout, did you not, as a Gravely dealer?

A. Those could be taken for whatever they were.

Q. But you received them, didn't you?

A. About shortages?

Q. No. Bulletins.

A. Oh, yes, we received bulletins often telling us about the half million dollar addition they had and running 24 hours a day in production.

Q. Not during the war period, was it, Mr. Graves?

A. Well, I believe so.

Q. You believe so?

A. I know they were making that addition when I was there in 1941.

Q. Mr. Graves, you knew at the start of the war Gravely production was curtailed by the order of the War Production Board to 24 per cent of what their production had been, and tractors were only to be sold under allotment to the manufacturer from the War Production Board or on priorities, didn't you?

A. There were allocations and there were regulations. [72]

Q. And you knew there were priorities?

A. That is right.

Q. Mr. Graves, there is mention made here of the Pay in Advance plan. You know about that

(Testimony of David E. Graves.)

plan; you have referred to it. That is where a customer got a priority, is it not, when he made his deposit and it was invested by the company in war bonds? That was the Pay in Advance plan, wasn't it?

A. I believe it was.

Q. Did you sell any tractors under the Pay in Advance plan?

A. I didn't consider that that was good business.

Q. After Mr. Heinen wrote you this letter of June 1, 1946, did you do anything about screening your orders and obtaining deposits from this backlog of old orders which you had?

A. No, I said before that it was not our policy to take other people's money and operate on it.

Q. So you did nothing?

A. I did not do that.

Q. I now show you a letter dated June 5, 1946, from Mr. Heinen, which was produced by your counsel. I take it you received it? You received that letter?

A. Yes.

Mr. Tenney: We offer it in evidence, if your Honor please.

The Court: It may be admitted.

(Letter from John W. Heinen to H. V. Carter Company dated June 5, 1946, was received in evidence, marked Defendants' Exhibit W, and read.)

Q. (By Mr. Tenney): I now show you a series of letters, the top one being dated July 3, 1946, letters and documents, bearing your signature. I will

(Testimony of David E. Graves.)

ask you if you sent that to Mr. Heinen at Glendale.

A. Yes, sir.

Mr. Tenney: We offer this in evidence, if your Honor please, as our exhibit next in order.

The Court: Admitted.

(The letters referred to were received in evidence, [73] marked Defendants' Exhibit X, and the letter of July 3 read.)

Q. (By Mr. Tenney): Attached to this document is an order of the H. V. Carter Company No. 31493 covering 45 Gravely Model L tractors with rubber tires and various attachments. That is the 45 tractors which make up part of this alleged claim of yours for 122, isn't that correct?

A. That is correct.

Q. And the contracts bear your signature, three copies of them. Was this contract ever signed by the Gravely Motor Plow & Cultivator Company?

A. We never received it.

Q. So you never received any signed contract back? A. No, sir.

Mr. Carroll: Do you have the answer to that letter, counsel?

Mr. Tenney: We will examine our file over the noon hour.

Mr. Carroll: Counsel, you do not make any question that this order for the 45 tractors was also submitted to the Gravely Plow and Tractor Company of West Virginia?

Mr. Tenney: I believe it was. I think we can

(Testimony of David E. Graves.)

agree that that order was submitted. May I ask you one question, please, Mr. Graves:

Q. You recognize Mr. Heinen's handwriting?

A. Mr. Heinen's?

Q. Yes. [74]

A. No, I did not. Pardon me just a moment.

Q. You have seen his signature, haven't you, on letters? A. Yes, I have.

Q. You can't state whether or not that is in Mr. Heinen's handwriting?

A. May I, for general information——

Q. Will you answer my question first?

A. Sure. I would not recognize his writing, no.

Q. Would you know whether it is his signature?

A. No, I would not.

Q. I do not expect you would be a handwriting expert, Mr. Graves.

A. No. You will notice that this order is addressed to the Gravelly Pacific Company and the Gravelly Motor Plow & Cultivator Company, Glendale and Dunbar.

Q. Yes, it is addressed to the distributor in Glendale and also to the factory, that order.

A. That is correct. And may I say, too, that Mr. Heinen told me that that had been forwarded to the factory for their signature.

Q. That the contract had been forwarded?

A. That is correct.

Q. When did Mr. Heinen tell you that? When and where?

(Testimony of David E. Graves.)

A. That is my remembrance that he did. I would sooner look through our correspondence. [75]

Q. Your remembrance is that he told you but you do not recall when and where?

A. That is right.

Q. It may have been in writing?

A. May have been, yes, sir.

Mr. Tenney: This notation I was referring to, your Honor, which appears on the letter I did not read——

Mr. Carroll: May I see that, counsel?

Mr. Tenney: Yes. It says "Contract and order not accepted."

Mr. Carroll: Let me see that.

Mr. Tenney: It is in evidence, counsel, "Contract and order not accepted."

Mr. Carroll: This is not a jury case, so I have no objection to your making the point.

Mr. Tenney: You do not think I am trying it like a jury case, do you?

Mr. Carroll: Pencil notations appearing on a letter.

Q. (By Mr. Tenney): Mr. Graves, I am showing you a letter dated June 11 addressed to you, which we received from counsel. You might want to refer to it. Did you read the attached?

A. Yes, I did.

Mr. Tenney: Very well. We offer this in evidence, if your Honor please. [76]

The Court: Admitted as Y, I believe.

(Testimony of David E. Graves.)

(Letter from John W. Heinen to D. E. Graves dated July 11, 1946, was received in evidence, marked Defendants' Exhibit Y, and read.)

* * *

Q. (By Mr. Tenney): The next letter I show you, Mr. Graves, is dated July 29, 1946, from Mr. Heinen. I ask you if you received that. You received that?

A. Yes—a very nice letter.

Mr. Tenney: I am glad you like it. We offer this in evidence.

The Court: It may be admitted as Exhibit Z.

(Letter from John W. Heinen to D. E. Graves dated July [77] 29, 1946, was received in evidence, marked Defendants' Exhibit Z, and read.)

Q. (By Mr. Tenney): The next letter, dated August 14, 1946, probably another nice letter—did you get that? A. Yes, sir.

Mr. Tenney: We offer this letter in evidence, your Honor.

The Court: It may be admitted.

(Letter from John W. Heinen to D. E. Graves dated August 14, 1946, was received in evidence, marked Defendants' Exhibit AA, and read.)

Q. (By Mr. Tenney): The next letter received

(Testimony of David E. Graves.)

from your counsel, which I take it you received from Mr. Hall, is dated September 5, 1946.

A. Yes, sir.

Q. You received that letter?

A. I received it.

Mr. Tenney: We offer this in evidence.

The Court: Admitted.

(Letter from D. Ray Hall to D. E. Graves dated September 5, 1946, was received in evidence, marked Defendants' Exhibit BB, and read.)

The Witness: May I comment on that?

Mr. Tenney: Go ahead.

The Witness: The meeting to which Mr. Hall refers was the meeting in Dunbar at the time I was taken to the building [78] they had contracted——

Q. (By Mr. Tenney): This was in October of the prior year, wasn't it, Mr. Graves?

A. That is correct, in Charleston, and that is the building which we were prepared to go ahead with provided Mr. Hall or the Gravely Company would agree to give us 70 tractors per year.

Q. That was the \$10,000 building that you referred to yesterday?

A. That is correct.

Q. If you got 70 tractors a year?

A. Yes, sir.

Q. As I understand your testimony, and correct me if I am wrong, Mr. Graves——

Mr. Carroll: I am going to object to this. The

(Testimony of David E. Graves.)

witness was in the midst of making some comments. Counsel is now interrupting him.

The Witness: The building—I explained that all yesterday.

Q. (By Mr. Tenney): You did, yes.

A. I concluded, after calculating it carefully, it would require 70 tractors a year to finance the operation, and I asked Mr. Hall if he would give us 70 tractors a year, beginning with the time we had the building ready. He said No, he would not set any time that he could make delivery. I do [79] not say that he refused to give us the tractors, but he would not agree on any specific number at any specific time. We would have to take our chance as to what would be available.

Now, this building matter was one thing that Mr. Hall—the agreement, however, with Mr. Heinen was that we would remodel the building in accordance with the arrangements made with Mr. Heinen at that time, and that we had done, of course, prior to this letter from Mr. Hall, so there seemed to be a conflict.

Q. Have you finished?

A. I think so.

Q. Now, Mr. Graves, isn't it a fact that when you were back at Dunbar in October, 1945, Mr. Hall told you he could not promise you any tractors, that you would have to take your chance?

A. No, no, of the 70 machines he could not promise us any to finance that building.

(Testimony of David E. Graves.)

Q. He could not promise you any of the 70 tractors?

A. That would go on this building plan, because that building plan would have to be something maybe a year from then owing to the scarcity of materials.

Q. How many tractors did you expect to receive at that time when you were back there?

A. At that time? I expected to receive all that we had on order. As a matter of fact, I sent him a list of all the [80] orders we had placed with them so that he could look it over prior to my arriving in Dunbar and we could discuss it.

Q. You sent in that list prior to your arriving in Dunbar? A. Yes, sir.

Q. Have you a copy of that list?

A. Yes, sir.

Mr. Tenney: Will you excuse me just a minute, your Honor? I want to look at the deposition.

Q. Mr. Hall, you recall giving your deposition in this case, don't you, on Tuesday, December 16, 1947?

A. Pardon me. My name is Graves.

Q. I beg your pardon. I was reading Mr. Hall's name, and I put it in there. Mr. Graves, you recall giving your deposition on Tuesday, December 16, 1947? A. Yes, sir.

Q. Referring to page 14, line 19, and it will be stipulated, counsel, we can use the copies without having the originals opened?

Mr. Carroll: Surely.

(Testimony of David E. Graves.)

Q. (By Mr. Tenney): I refer you to the testimony commencing on line 19, page 14, Mr. Graves. It is a question by Mr. Stevens. Will you read the answer to that question? Maybe a couple of others, and then tell us whether or not you gave the testimony at the time.

Mr. Carroll: Page 14? [81]

Mr. Tenney: Line 19.

The Witness (after examining transcript referred to): That is right.

Q. (By Mr. Tenney): You gave that testimony?

A. That had to do with that building and the machines.

Q. You do not have to explain.

If your Honor please, I would like to read the question that was asked of Mr. Graves on December 16, 1947:

“Mr. Stevens: In this letter of September 17, Mr. Graves, Mr. Hall states: ‘In other words get the building located and the man located to run the Gravely Business.’ Now, was that ever done?”

“Answer: We already owned the property. Mr. Hall would never supply us, nor never give us a specific shipping date as to the number of machines. As a matter of fact, he told me verbally that he would not promise us any machines, or any other number, verbally.”

You gave that testimony?

A. I did.

(Testimony of David E. Graves.)

Q. I show you now a bulletin purporting to be issued by Gravely of February 2, 1945, and ask you if you recall receiving that bulletin, as a Gravely dealer.

A. Yes, we received that, I am quite sure.

Mr. Tenney: We will offer that in evidence, if your Honor please. [82]

The Witness: This is the one item that impressed me.

Mr. Tenney: It is not in evidence. Maybe I had better show it to you a little later. We will offer it in evidence, your Honor.

The Court: It may be admitted.

(Bulletin No. 21 dated February 2, 1945, was received in evidence and marked Defendants' Exhibit CC.)

Q. (By Mr. Tenney): Do you want to make some comment about some item in that?

A. Yes. My impression was when you said the quota was reduced to a low point, it says, "The new allotment will in all certainty be made. This number represents 76% of our 1941 sales."

Q. That was 1945, just before the end of the war, which was fortunate, wasn't it? A. Yes.

Q. When this bulletin came out.

I am not going to take the time to read this whole thing, counsel, unless you want me to. There is one thing I would like to call to Mr. Graves' attention, and that is the statement in the bulletin. "When

(Testimony of David E. Graves.)

restrictions are lifted Buy in Advance orders will be filled more quickly than a regular order.”

You recall that language being in there or seeing it in the bulletin?

A. I thought it was very unfair to those people who had been [83] waiting.

Mr. Tenney: We will ask that the last answer go out as being a voluntary statement.

The Court: That may go out.

Q. (By Mr. Tenney): I show you another bulletin dated June 17, 1945, and ask you if you recall receiving that one.

Mr. Carroll: Are you putting this in evidence, counsel?

A. I think we would have received this. I would not question it.

Mr. Tenney: That bulletin is offered.

The Court: It will be admitted.

(Bulletin dated June 17, 1945, was received in evidence and marked Defendants' Exhibit DD.) [84]

* * *

Q. (By Mr. Tenney): Mr. Graves, this morning, I showed you a copy of a letter dated April 15, 1946, purportedly addressed to you, Mr. D. E. Graves from Mr. Heinen, and you said you did not recall whether you received that letter, and it was marked for identification. Subsequently your counsel found it in your files. You did receive that letter. We now have the original. Will you state if you received that, which I assume you did?

(Testimony of David E. Graves.)

A. At any event, our office received it.

Q. Have you seen that letter before? It is addressed to you.

A. That is correct. I will say that I did, to dispose of it.

Mr. Tenney: At this time I would like to have Exhibit Q [85] for identification marked in evidence.

The Court: It will be received in evidence.

(The letter heretofore marked Defendants' Exhibit Q for Identification was received in evidence, and was read.)

Q. (By Mr. Tenney): Now, Mr. Graves, directing your attention again to the portion of this letter, "On the orders you now have on hand you should verify their authenticity and start numbering from them," did you ever verify the authenticity of those orders?

A. In the first place, in view——

Q. Will you answer the question Yes or No and then explain, please.

A. We did that before we placed the order as an acceptable order to us.

Mr. Tenney: I will submit, your Honor, he is not answering the question.

Q. After the receipt of this letter I would like you to tell me, Mr. Graves, if you verified the authenticity of the orders that you had on hand.

A. The date of that letter is what?

Q. April 15, 1946. A. Yes, we did.

(Testimony of David E. Graves.)

Q. How did you verify them?

A. We sent out form letters at intervals and contacted the people by phone, and if our men were in the territory they [86] would check with them.

Q. After the date of this letter you did that?

A. Yes, sir.

Q. And you have those form letters that were sent out?

A. Yes, sir, we have a fair sample of one.

Q. Can you show me a fair sample of that letter?

This document which counsel has handed me, is that one of the types of letters you sent out?

A. That is right.

Q. What is the date of that letter?

A. January 15, 1947.

Q. And what was the date of the termination letter you received from Mr. Heinen? Do you recall that?

A. Do you refer to his telling us we were no longer——

Q. That is correct. A. That was in 1946.

Q. August 23, 1946, subsequently confirmed by letter from Mr. Hall received some week or so after that, wasn't it?

A. We had been in contact with these customers previously.

Mr. Tenney: I would like to offer this in evidence, if your Honor please, and I am going to read it to the Court.

The Court: It may be admitted.

(Testimony of David E. Graves.)

(The letter referred to was received in evidence, marked Defendants' Exhibit EE, and read.)

Q. (By Mr. Tenney): Now, Mr. Graves, at the time of this letter of January 15, 1947, you were handling other tractor [87] lines, were you not?

Mr. Carroll: This is objected to as incompetent, irrelevant and immaterial, if your Honor please, whether he was handling other tractors or not.

The Court: I will receive the testimony. The objection is overruled.

The Witness: We were handling other tractors and we——

Q. (By Mr. Tenney): And you were also——

Mr. Carroll: Just a moment, counsel. You interrupted the witness.

Q. (By Mr. Tenney): I am sorry. Had you finished?

A. We had always handled garden tractors.

Q. How many other types of garden tractors did you handle other than Gravely?

A. We had two principal types.

Q. What were they?

A. The Ariens-Tiller and the Vaughn.

Q. Didn't you also handle the Centaur and the Beeman and the Rototiller? You have handled those at times, haven't you?

A. The Beeman and the Centaur—the Beeman must have been back in 1916 or 1917. We handled the Centaur along about the same period.

(Testimony of David E. Graves.)

Q. At any rate, at the time this letter of January 17, 1947, was written you were handling at least two other models?

A. I would like to correct that 1916 and 1917, because I was [88] not connected with that, but the company handled the Beeman.

Q. Did you hear my last question?

(Question read.)

The Court: I do not believe he answered that question.

Mr. Tenney: I thought I saw him nod his head.

The Witness: That is true.

Q. (By Mr. Tenney): At the time this letter was sent out you knew you were not going to receive any Gravely tractors, didn't you? You had been so notified?

A. I guess that was the intent of the notification.

Q. So in effect what this letter was doing was offering this potential customer, Mr. Abbott, another tractor that you were carrying; isn't that the true fact, Mr. Graves? A. Not necessarily.

Q. What was the intent of the letter?

A. To find out whether he was interested in a garden tractor, and particularly referring to his order for that Gravely tractor.

Q. If he was interested in a garden tractor what kind would you have sold him?

A. We would have sold him a Gravely tractor if we could have procured it.

(Testimony of David E. Graves.)

Q. But you had no Gravely tractor?

A. We did not.

Q. So then you would have sold him another type that you [89] carried?

Mr. Carroll: Object to this, if the Court please. It is speculative and argumentative.

Mr. Tenney: I will discontinue this line of testimony, your Honor. Withdraw that question.

Q. Will you look at this letter, Mr. Graves, of June 28, 1943, with an order, and particularly I direct your attention to the reply on the reverse side.

Mr. Carroll: May I see that?

Mr. Tenney: Yes, I showed you these this morning. Do you want to see it again?

Mr. Carroll: What is the date?

Mr. Tenney: I have forgotten.

The Witness: That is June 28, 1943. All right, we offered to take a carload.

Q. (By Mr. Tenney): You have not heard my question, Mr. Graves. You wrote that letter and received that reply on the reverse side, is that correct?

A. That is right.

Mr. Tenney: We will offer it in evidence, if your Honor please.

(Letter dated June 28, 1943, and reply were received in evidence and marked Defendants' Exhibit FF.)

Q. (By Mr. Tenney): Mr. Graves, this order No. 22837 dated June 28, 1943, addressed to Gravely

(Testimony of David E. Graves.)

Motor Plow Co., [90] Dunbar, West Virginia, covers 25 Model D Gravely tractors and 5 Model L Gravely tractors. The 25 Model D Gravelys are those referred to in your bill of exceptions, are they not? This particular order?

The Court: You mean the bill of particulars?

Mr. Tenney: The bill of particulars. Excuse me, your Honor.

Mr. Carroll: We will object to this. I think the document speaks for itself.

Mr. Tenney: I will show it to him.

Q. I will show you, Mr. Graves, to refresh your recollection, a copy of your bill of particulars, and do you notice that item on Order No. 22837, 25 Model D Gravely tractors and 5 Model L Gravely tractors. That is this order, is it not?

A. Five Model D.

Q. That is the order referred to in the bill of particulars for the 25 Model D and the 5 Model L, isn't it?

A. That is right.

Mr. Tenney: If your Honor please, the first document constituting part of this exhibit is the order 22837 dated June 28, 1943, addressed to Gravely Motor Plow & Cultivator Company for 25 Model D Gravely tractors and 5 Model L Gravely tractors.

Mr. Carroll: And some other things.

Mr. Tenney: Yes, and equipment. [91]

Mr. Carroll: Yes.

Mr. Tenney: "25 Model D tool holders complete with standards and steels, 5 Model L ditto, 10 8-

(Testimony of David E. Graves.)

blade 11-inch disc. This order to be shipped from 1943-1944 allocation.”

(The letter included in Defendant’s Exhibit FF was read by Mr. Tenney.)

Q. (By Mr. Tenney): I show you now, Mr. Graves, a letter dated October 12, 1942, purporting to bear your signature.

The Court: Has GG been admitted?

The Clerk: This is FF, your Honor, the one he just read from.

Mr. Tenney: GG is coming up, your Honor.

The Court: Pardon me.

A. I surely wrote that first letter and the replies seem familiar.

Mr. Tenney: We offer this in evidence, if your Honor please.

The Court: It will be admitted.

(The correspondence between D. E. Graves and D. Ray Hall dated respectively October 12, 1942, and October 19, 1942 was received in evidence, marked Defendants’ Exhibit GG, and read.)

The Witness: Mr. Tenney, in commenting on that——

Q. (By Mr. Tenney): Go ahead if you want to comment.

A. I am of the opinion from the nature of that, that that order was accompanied by a War Production Board order from the [92] Department of

(Testimony of David E. Graves.)

Agriculture, and those tractors were rationed. They were rationed according to State allocations, and the manufacturer was giving the list, as I remember it, of the tractors which were available, and the rationing certificates were issued against the allocation permitted the manufacturer, and when a farmer—and garden tractors were principally for the production of food at that time—brought us the certificate from the War Production Board, we considered it an order from the War Production Board to deliver that piece of equipment to the party who presented the certificate to us.

Q. Then I understand from what you said your understanding of the situation was the same as Mr. Hall's in his letter to Mr. Hines when he said, "Also, this order if accepted would be subject to the conditions required by the War Production Board and which requires that all farm machinery must be rationed. But, if for farming purposes, this permission can be secured."

A. It was secured, but it was mandatory at the time. There was no option on the part of us nor the supplier. It was a mandatory order when those rationing certificates were issued.

Q. Have you any comment to make about this portion of the letter, Mr. Graves: "It is sincerely regretted we cannot accept your order only with the understanding that shipment is to be made when and if available."

A. May I comment? [93]

Q. Have you any comment to make on that?

(Testimony of David E. Graves.)

A. My comment is the War Production Board should not have issued the ration certificate, had it not been that the material was available and the manufacturer had been notified that that county or that State had that number of tractors, that they must ship to this State or to that county.

Q. You do not contend, do you, Mr. Graves, that on all those 122 orders you had rationing permits or authorization from the War Production Board, do you? A. I am discussing just this one.

Q. I am asking you another question. Do you know that? A. I do not.

Mr. Carroll: Do you know the number, counsel?

Mr. Tenney: No, I do not.

Mr. Carroll: You do not contend that is contained in the 122 orders?

Mr. Tenney: I can't tell you about the number, Mr. Carroll. The next one is a numbered order.

Q. Will you look at this letter and see if you wrote that. Did you write that letter?

A. I did.

Mr. Tenney: We will offer this in evidence, if your Honor please.

Mr. Carroll: No objection.

The Court: I may be admitted. [94]

(Order and correspondence between D. Ray Hall and E. F. Dowler and D. E. Graves and Gravelly Motor Plow & Cultivator Company dated January 10, 1944, was received in evidence, marked Defendants' Exhibit HH, and read.)

(Testimony of David E. Graves.)

Q. (By Mr. Tenney): This is the order, I take it, to Mr. Dowler? His name is on it, Paradise, California.

A. That is right.

Q. Do you want to see the bill of particulars? I think that is listed in there. I can call your attention to the number of it.

A. 23795.

Q. One Model L Gravely tractor with iron wheels, 23795, is that right?

A. That is right. That was a priority order.

Q. The letter attached is addressed to this purchaser at Paradise. Here is a copy I am going to show you, Mr. Graves, of that same letter, a mimeographed copy, and I will ask you if you have seen this, which was sent to the customers. That is the same letter I just read, Mr. Graves. Have you seen that before?

A. I presume so. It is a stock letter.

Mr. Tenney: We will offer this, if your Honor please.

Mr. Carroll: I will stipulate it may go in evidence.

Mr. Tenney: Thank you for the stipulation. It saves a lot of trouble. [95]

(Letter from D. Ray Hall, undated, was received in evidence, marked Defendants' Exhibit II.)

Q. (By Mr. Tenney): I will ask you, Mr. Graves, is it not your understanding that on the orders that were sent in, the individual orders, not the order for the 25 or 30 tractors, where you gave

(Testimony of David E. Graves.)

the names of customers, that those names were furnished at the request of the company so this letter of acknowledgment could be sent; isn't that correct?

A. I often wondered why they wanted such detail in the names.

Q. You did not answer the question.

(Question read.)

A. I presume so.

Mr. Tenney: I have already read to your Honor the letter. I want to read what is appended to the letter.

(The second page of Defendants' Exhibit II was read by Mr. Tenney.)

Q. (By Mr. Tenney): Now, Mr. Graves, you have already testified that you carried these two other lines of tractors and earlier you carried the tractors I interrogated you about, the Centaur, Beeman and Rototiller; is that correct—your company? A. Yes, sir.

Q. As I understand your testimony, Mr. Graves, it was to the effect that payment on the tractors you received from Gravely was to be sight draft against bill of lading? [96]

A. That was the factory policy.

Q. Your transactions were always handled in that manner, were they not? A. As I recall.

Q. Then you in turn bought at the list price from the factory and you made your profit on the retail to the customer, is that correct?

(Testimony of David E. Graves.)

A. That is right.

Q. And you were not working on a commission basis?

A. Unless the factory shipped direct to the customer, then they paid us a commission.

Q. Most of the transactions, practically all of them, were direct shipments to you, isn't that correct?

A. That is right.

Q. I interrogated you a little bit this morning, Mr. Graves, about the difficulties and the curtailment of production during the period of the war. Isn't it true in your business, as in many other businesses during the war, the demand far exceeded the supply?

A. Yes, it did. Well, not in all lines.

Q. It is true in Gravely, isn't it?

A. For agricultural purposes, yes, sir.

Q. For any purpose, isn't that true?

A. Not necessarily.

Q. The only people who could get them during the war were [97] those who got them on priorities for agricultural purposes, isn't that so?

A. That is what we thought until Mr. Hall told us we ought to go out and get orders for industrial uses.

Q. Didn't I understand you to testify yesterday that you were instructed by the factory to keep the prospects in line, wasn't that your testimony?

A. For future business.

Q. For future business? A. That is right.

Q. That order for the 45 tractors of July 3, 1946, which was introduced in evidence this morn-

(Testimony of David E. Graves.)

ing, did you ever receive any acknowledgment from either Gravely Pacific, the distributor in California, or from the factory in connection with that order?

A. I did not have time this afternoon—I intended to look in our files and see what we had on that.

Q. That is pretty important. Hadn't you checked before to see if you had any acknowledgment of that order?

A. I may have, but frankly, I don't remember.

Q. But you haven't any at this time?

A. Not at this time.

Q. You can't state definitely whether or not you did?

A. No.

Mr. Carroll: Doesn't your answer admit receipt of that [98] order, counsel?

Mr. Tenney: Certainly we admit the receipt of it. It came along with the contract, Mr. Carroll.

Mr. Carroll: You admit acknowledgment of receipt of it?

Mr. Tenney: No, we do not admit the acknowledgment of receipt, because it was not acknowledged.

Mr. Carroll: I understood your answer admitted the receipt of all these orders.

Mr. Tenney: I think it is a technical point. I think the Court will pass upon whether or not it was acknowledged.

Q. You referred to a branch office being established in Los Angeles.

(Testimony of David E. Graves.)

The Court: Let me ask you a question. For our purposes here there is a distinction between receipt and acknowledgment. Does acknowledgment mean what you might call an acceptance?

Mr. Tenney: No, your Honor, the only acknowledgment we would admit is just receipt of the order. That is why we had the big discussion yesterday about the inadvertence in admitting the acceptance in the answer, which we now deny.

Mr. Carroll: The reason I raise the question now, your Honor, I understood he was asking the witness with respect to acknowledgment or receipt of the order, and I was pointing out, if I understood what counsel was going to do to his answer yesterday, although denying acceptance, he was going to [99] admit receipt of all those orders.

Mr. Tenney: We admit receipt of them. There is no question about that.

Mr. Carroll: That is the only reason I brought it up at this time.

The Court: That is admitted.

Mr. Tenney: We received orders from them.

The Court: That is admitted in the new answer.

Mr. Tenney: In the answer, but there is an express denial that they were ever accepted. I will reframe my question.

Q. You made some reference in your cross-examination this morning to a branch office in Los Angeles, and I believe you stated you first met Mr. Heinen down there, Mr. Graves, in 1945; is that right? A. That is right.

(Testimony of David E. Graves.)

Q. And in 1945 you knew that Gravely Pacific, Inc., was a separate corporation, did you not?

A. I did not.

Q. When did you first learn it was a separate corporation?

A. When we received a financial report and they were listed as one of the numerous corporations owned by the Gravely Motor Plow & Cultivator Company. That is as far as I remember it.

Q. I showed you this morning a Gravely bulletin, which you said you received on June 10, 1945, Defendants' Exhibit DD. I believe I read this portion of it to you. It is on the second [100] page: "Sales divisions established. Twelve new corporations have been established at strategic points in the United States. The controlling stock is owned by this company. The purpose of these is to help you, and will not in any way interfere with the work of each agent. It will bring the factory and its policies closer to the agent. Meetings will be planned at these new headquarters. New contracts will be furnished through these corporations outlining fully territory and other general conditions."

That was June 10, 1945. After you met Mr. Heinen your dealings were with him in connection with endeavor to obtaining new exclusive dealership, were they not?

A. That is correct. May I comment further on that, Mr. Tenney? That mentions, as I recall, fifteen corporations.

Mr. Tenney: No, I think it was eleven.

(Testimony of David E. Graves.)

The Court: Twelve, isn't it?

Mr. Tenney: Twelve.

The Witness: Twelve, more or less, at any rate. As I understand, the Gravelly Pacific is one of the 21 corporations and one of the last formed, so that would hardly have been applicable.

Q. (By Mr. Tenney): You understand it is one of the last formed? A. Well, I don't know.

Q. You wouldn't want to say that, would [101] you? A. No, sir.

Q. Between the time that you met Mr. Heinen, which was in the summer of 1945, and up to the date of his letter to you of August 23, 1946, how many tractors did you receive?

A. Between what dates?

Q. From the summer, let us say, July of 1945 to August 23, 1946, how many tractors did you receive? A. Four or five.

Q. Isn't it a fact that you received four and they were delivered by Mr. Heinen to your plant by truck?

A. We received four by truck, yes, that is correct.

Q. And those were delivered by Mr. Heinen?

A. Delivered to us, that is correct.

Q. By him? A. That is right.

Q. From Glendale?

A. I wasn't at the starting point. We got them.

Q. They brought them by truck, didn't they?

A. That is right.

(Testimony of David E. Graves.)

Q. There is one thing I wanted to ask you also about one of your exhibits here. This bulletin was shown you by your counsel yesterday and introduced in evidence as Plaintiff's Exhibit 4. I will show it to you again to refresh your recollection about it. A. Yes, sir. [102]

Q. You did not intend to have us believe that plenty of tractors were available at the time of that bulletin, did you? A. Your question again?

(Question read.)

Mr. Carroll: Intend by what, counsel? I do not quite understand the question. Is this a Gravely bulletin?

Mr. Tenney: Yes, this is a Gravely bulletin. You put it in.

Mr. Carroll: You are not asking the witness what was intended by Gravely, are you?

Mr. Tenney: I will reframe the question.

Q. You will note, Mr. Graves, that the subject of this is "Delivered Price List," isn't that right?

A. That is right.

Q. It says, "Attached is new delivered price list. This includes the price increase of July 1. We can supply these in quantity. Let us know how many you will require." That "supply these in quantity" referred to the price list, is that your understanding? A. That is right.

Q. Not tractors? A. No. [103]

(Testimony of David E. Graves.)

Redirect Examination

By Mr. Carroll:

Q. I am more interested, Mr. Graves, and we are all, in these 122 unfilled orders you had. Did the Gravely Company tell you in what order you should fill those orders when you received the machines from the Gravely Company which you had on order from them?

A. I believe we had in our files a letter definitely in which they told us that those matters are left to the discretion of the dealer, because the dealer had all these other matters.

Q. Did you write to the company to inquire specifically in that regard? I will show you the letter in a minute.

A. I may have inquired, but if I wrote them at all I would tell them our understanding of the law and the War Board regulations.

Mr. Carroll: Do you have the original of this letter? Do you have any objection to this copy?

Mr. Tenney: No objection.

Mr. Carroll: I hand you a letter of April 30, 1946, signed by the H. V. Carter Company to the Gravely Motor Plow & Cultivator Company, and ask you if you sent that letter about that time.

A. Yes, sir.

Q. Is this the reply that you received to it?

A. That is correct. [105]

Mr. Carroll: We will offer this as Plaintiff's

(Testimony of David E. Graves.)

Exhibit next in order, as one exhibit, your Honor.

(Letter of April 30, 1946, and reply were received in evidence, and marked Plaintiff's Exhibit 5.)

* * *

At this time, your Honor—it may be somewhat out of order, but so that the sequence will be complete I would like to offer in evidence, if the Court please, the certified copies of the decree of distribution in the Estate of H. V. Carter, which shows the assignment of all the assets, contracts, and so on, of the H. V. Carter Company to the plaintiff in this action, and a certified copy of a consent thereto signed by the defendant Gravely Plow & Cultivator Company.

The Court: Both as one exhibit?

Mr. Carroll: Yes, your Honor.

Mr. Tenney: We are happy to stipulate that this go in. This has to do with the 1925 contract.

Mr. Carroll: This is entered April 27, 1936, and I am referring now to the decree and order of distribution and the consent signed by the Gravely Motor Plow & Cultivator Company by D. Ray Hall, Vice President, dated the 25th day of April, [106] 1935.

The Court: Both of those exhibits will be admitted as Plaintiff's Exhibit 6. [107]

* * *

Mr. Carroll: We are referring to the occasion

(Testimony of David E. Graves.)

of your visit to which you testified to Mr. Hall in October, I believe, [110] 1945, is that correct?

A. That is correct.

Q. Was anyone else present during any conversation you may have had regarding these cancelled orders other than yourself and Mr. Hall?

A. I think not.

Q. If you had any conversation regarding these unfilled orders with Mr. Hall—and I am particularly interested whether you had any conversation about delivery of these unfilled orders—will you tell his Honor what if anything was said?

A. It is rather difficult to remember the exact words.

Q. Give us the substance of the conversation to the best of your recollection, if there was one.

A. I asked Mr. Hall—I told Mr. Hall that I had sent him that list of unfilled orders and would like to discuss it with him. I had one copy of that with me. My recollection of it was he slid it back across the table and reminded me of this extensive improvement they had made, and he said, “We will get those to you in time.”

Q. Did he at any time tell you he would not deliver those to you? A. He did not. [111]

* * *

Q. (By Mr. Carroll): State so far as you can the substance of what he said to you about the production or whatever it was that he spoke to you about, Mr. Graves.

A. He assured me they were in production on

(Testimony of David E. Graves.)

a large scale and gave me to understand that in the course of what I took to be reasonable time that we would get our back orders filled.

Q. I would like to clear up, if there is any uncertainty, and there is in my mind: Did that conversation have any [112] connection with or dependence upon your undertaking to build a new building?

A. That was an entirely separate matter.

Q. Did the testimony you have given this morning about your telling Mr. Graves and Mr. Hall that it would require 70 tractors to finance that building, did that have anything to do with your conversation concerning your unfilled orders?

A. It did not.

Q. There has been some discussion here about deposits. Did anyone ever tell you that you were required to take deposits on the orders that you received from customers?

A. Anyone connected with whom?

Q. Did Mr. Hall or the Gravely Company ever tell you that they would not want orders unless they were accompanied by deposits?

A. I believe that they later said that those accompanied by deposits and considered priority—I mean considered advance delivery, or whatever they were, would be shipped first.

Q. But did he ever tell you that he would not honor the orders that you had placed with him because you had not taken deposits from your customers?

Mr. Tenney: Did who?

(Testimony of David E. Graves.)

Mr. Carroll: Mr. Hall.

The Witness: Not to my remembrance.

Q. (By Mr. Carroll): As a matter of fact, I think you have [113] told us, or so that I won't be leading you, will you please repeat again how you were required to pay for the tractors you got from the Gravely Company?

A. We paid for them sight draft bill of lading.

Q. And that means, as I understand it, the Gravely Company drew against you as soon as they were loaded on the cars in West Virginia?

A. That is correct.

Q. And you paid for them then?

A. That is correct.

Q. The price you paid for them was what in relation to the list price?

A. They would be the list less 30, with the exception I am trying to refresh my memory, on the four that Mr. Heinen brought up there, I am of the opinion that we paid cash for them when he left them there. I am not certain on that because I have not looked at the records.

Q. At all events, the price of these to you was 30 per cent off the list price?

A. That is correct.

Q. So that if the price of the average of those tractors was \$350, the list price, you would get that for 30 per cent off, is that correct?

A. That is correct.

Q. Then in event that you sold it to a customer, the farmer, [114] your profit or commission or

(Testimony of David E. Graves.)

whatever it may be called on the transaction would be 30 per cent of the list price of \$350, is that correct? A. That is correct.

Q. I do not wish to lead you, but I think you testified to this on direct examination, that at all times up to the filing of this suit you have been ready, willing and able to pay for the price of these 122 tractors had they been put aboard for you in West Virginia? A. That is correct. [115]

* * *

JOHN WILLIAM HEINEN

called for the plaintiff; sworn.

The Clerk: Will you give your name to the Court?

The Witness: John William Heinen.

Direct Examination

By Mr. Carroll:

Q. What is your name, please?

A. John William Heinen.

Q. Where do you reside?

A. North Hollywood, California.

Q. May we have the address, please?

A. 4346 Colfax.

Q. When did you first become associated with the Gravely organization? A. In July, 1945.

Q. Will you tell us who hired you, please?

A. Mr. D. Ray Hall.

Q. Where did he hire you?

A. In Los Angeles.

(Testimony of John William Heinen.)

Q. I believe you are the manager of the Gravelly operations in Southern California, are you? [119]

A. We are the manager for the distributorship of Gravelly tractors in the State of California and three adjacent States.

Q. You are the manager here of the Gravelly Pacific Company, a corporation, are you?

A. That is right.

Q. And one of the defendants in this action?

A. Right.

Mr. Carroll: We would like the record to show, if your Honor please, that we are examining this witness pursuant to the provisions of Section (b) of Rule 43 of the Rules.

The Court: Adverse witness?

Mr. Carroll: Yes, your Honor.

Q. What are your functions down there?

A. I am the manager for the corporation.

Q. Tell us what you do, please.

A. We sell and service Gravelly tractors and equipment and appoint dealers.

Q. In the State of California?

A. In the State of California.

Q. Do you maintain a supply of parts?

A. We do.

Q. Has that been the general scope of your activities since your employment by Mr. Hall in 1945?

A. That is right.

Q. You said you appoint dealers? [120]

A. Right.

(Testimony of John William Heinen.)

Q. Have you appointed any dealers in Northern California? A. Yes.

Q. Whom did you appoint in Northern California? A. H. G. Seavey.

Q. Where is Mr. Seavey located?

A. He is in Hayward.

Q. When did you appoint him?

A. As I recall, it was the latter part of 1946, although I am not sure of the date.

Q. Has Mr. Seavey an office? A. Yes.

Q. Describe that for us, will you, please.

A. He has a regular place of business, a display front, a store on a busy boulevard.

Q. Is it in an auto court? A. No.

Mr. Tenney: If your Honor please, I do not see the materiality of this and I am going to object to it as incompetent, irrelevant and immaterial, and having no bearing on any issue in this case.

Mr. Carroll: I do not know how important it is, your Honor, either, but they tried to get rid of Mr. Graves because he did not build a building, and I think it is relevant on the question of their good faith. [121]

Mr. Tenney: I take exception to counsel's remark that we tried to get rid of Mr. Graves. The evidence would not so show.

Mr. Carroll: Let me put it this way and try to avoid any controversy with counsel. It is alleged as one of the reasons why they wished to terminate the relationship——

(Testimony of John William Heinen.)

The Court: The objection is overruled. Answer the question.

(Question read.)

Mr. Tenney: May my objection go to this entire line of questioning, your Honor?

The Court: Yes.

Q. (By Mr. Carroll): You say he is not located in an auto court?

A. The place of business is not located in an auto court.

Q. How big is his place of business?

A. I would say his building is approximately 40 by 40, 40 by 50, 60—I don't know the exact dimensions, improved building.

Q. How many employees has he?

A. He has his two sons, who help, a mechanic, and his wife, who acts as stenographer and book-keeper.

Q. You are quite sure he is not at or near an auto court?

A. Oh, yes, he is near an auto court.

Q. When did you say you appointed him? [122]

A. I should say the latter part of 1946.

Q. As a matter of fact, isn't this the true representation of the building you have been testifying to the Court about?

A. Well, this shows only one-half of the building. It does not show the display on this side.

Q. That is the front of the building, is it not?

A. This is one-half of the front, yes, sir.

(Testimony of John William Heinen.)

Mr. Carroll: I will ask that this be admitted in evidence, if the Court please, as plaintiff's next in order.

Mr. Tenney: I make my same objection, your Honor.

The Court: It will be admitted.

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit 9.)

Q. (By Mr. Carroll): Whom did you consult with when you were about to appoint Mr. Sibby?

A. We consulted with the president of our corporation, Mr. D. Ray Hall.

Q. I asked you whom you consulted. A. I.

Q. Were you using that as the editorial "we"?

A. Possibly.

Q. You mean that you consulted with him?

A. Right.

Q. With whom did you consult about your visits to Mr. Graves? A. No one. [123]

Q. What?

A. That was purely voluntary on my part.

Q. Did you not report your visits to Mr. Graves to Mr. Hall? A. Yes.

Q. Then you did consult with Mr. Hall?

A. After the visits, yes.

Q. When you appointed other dealers did you report it to Mr. Hall? A. Yes, sir.

Q. Reported to Mr. Hall about the supplies you had here in California? A. Yes, sir.

Q. And about the accounts you were servicing?

(Testimony of John William Heinen.)

A. Yes.

Q. And the Gravely Company—I do not mean the Gravely Pacific Company—but the parent company sent you lists of prospects in Southern California, did it not? A. Yes. [124]

* * *

Q. (By Mr. Carroll): You made the termination on Mr. Hall's [130] authorization, did you not?

A. Through his original permission, naturally, instructions.

Q. And acting as his agent?

A. Acting as his agent.

Q. And you also undertook, acting as his agent, to terminate any contractual relationship which the Carter Company had with the factory?

A. No, to the Gravely Motor Plow, no.

Q. Will you listen to this: "You may consider this letter an abrogation of any contractual obligations you may have felt you had with us or with our factory." Is it still your testimony to his Honor that you did not undertake to terminate the contractual relationship that the Carter Company had with the factory? A. Right.

Q. Did you perform any other functions out here for Mr. Hall that you have not told us about?

A. Not that I recall.

Q. You serviced their accounts so far as labor goes? A. Right.

Q. When the Gravely Company received inquiries, it sent them out here for you to service?

(Testimony of John William Heinen.)

A. Right.

Q. Did you do that all over California or just Southern California? [131]

A. Mostly in Southern California.

Q. And they sent you lists of prospects from the Gravely Motor Plow & Cultivator Company?

A. Right.

Q. And you investigated those prospects?

A. Right.

Q. And you reported back? A. Right.

Q. As a matter of fact, you were required to file reports for the Gravely Motor Plow and Cultivator Company in regard to that list of prospects, were you not?

A. New accounts that were good, yes.

Q. Doesn't that prospect list that they sent you have a space underneath saying "report back" in which you fill a report of the results of your interview with the prospect?

A. Our particular list did not have that.

Q. But you have reported back, results of your interviews with prospects? A. Yes.

Q. If any complaints or difficulties arise with the users of equipment of the Gravely Motor Plow and Cultivator Company in Southern California, do you take care of those? A. Yes.

Q. That has been your practice since you have been appointed? A. Yes. [132]

Q. And they have asked you this, but you did service machines that are sold by the Gravely Motor Plow and Cultivator Company in California?

(Testimony of John William Heinen.)

A. Within our territory, yes.

Q. And you maintain the parts that are available for Southern California for the Gravely Motor Plow and Cultivator Company, do you not?

A. We maintain it for our corporation here to service the accounts, yes, sir.

Q. And you do service the Gravely Motor Plow and Cultivator accounts from those parts, do you not?

A. Right.

Q. Do you keep any staff of repair people?

A. Yes.

Q. And that is to service these Gravely products that are being used in the southern part of the state?

A. Right. [133]

* * *

D. RAY HALL

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you give the Court your full name?

The Witness: D. Ray Hall, Dunbar, West Virginia.

Direct Examination

By Mr. Carroll:

Q. What is your name? A. D. Ray Hall.

Q. Where do you live, Mr. Hall?

A. In Dunbar, West Virginia.

Q. What is your position with the Gravely Motor Plow and Cultivator Company?

A. I am president of the corporation.

(Testimony of D. Ray Hall.)

Q. How long have you been president?

A. Since 1936.

Q. You are also president of this West Virginia corporation known as the Gravely Pacific Company, are you not?

A. That is right. [135]

* * *

Q. Who are the other officers of the Gravely Motor Plow and Cultivator Company, please?

A. The Gravely Motor Plow and Cultivator Company—I am president of it, Kenneth Thomas is vice-president and secretary. That is the extent of the officers of it.

Q. Don't you have a treasurer?

A. I beg your pardon. Kenneth Thomas is—may I be excused to get my briefcase? I think it is there.

Q. That is what I have been trying to get.

A. That is all right, but your question asked for finances.

The Court: Just a minute, now. Wait until we have the proper questions here.

Q. (By Mr. Carroll): Did you want to look at something in your briefcase, Mr. Hall?

A. Yes, please. [136]

Q. May I ask you one question before you look at those, Mr. Hall?

A. Go ahead.

Q. Don't you remember now who the treasurer of your company is without looking at your notes?

A. I am president of twenty-three different corporations and I know that I am president of it. I am not sure of all the officers.

(Testimony of D. Ray Hall.)

Q. Without looking at your notes——

A. Do you want the——

Q. Just a minute, Mr. Hall. The lawyers can ask the question here. Do you mean to tell us that you do not know who is the treasurer of the Gravely Motor Plow and Cultivator Company without consulting your notes? A. Certainly.

Q. You do not know? A. I do know.

Q. You know now? A. Yes.

Q. I thought you did not remember a minute ago.

A. Well——

Q. At all events, you remember now, do you?

A. Yes.

Q. Who is the treasurer?

A. The treasurer is V. D. Tippet. [137]

Q. How long has Mr. Thomas been with the company?

A. I would estimate since approximately 1933 or 1934.

Q. How long has he been the vice-president?

A. Mr. Thomas is not the vice-president.

Q. I thought you told me he was the vice-president and secretary.

A. Mr. Thomas is secretary.

Q. Was that a mistake when you told me he was the vice-president? A. That is right.

Q. How long has he been secretary then?

A. The same period of time.

Q. How long has Mr. Tippet been the treasurer?

A. I would say possibly 1938. These are from my memory, as far as the length of time.

(Testimony of D. Ray Hall.)

Q. Do you wish to add another officer at this time to the officers of the Gravely Motor Plow and Cultivator Company?

A. The vice-president of the Gravely Motor Plow and Cultivator Company is A. D. Williams.

Q. How long has Mr. Williams been vice-president?

A. From my memory I would say approximately 1940.

Q. What are those records you are testifying from?

A. These are notes as to the information you asked me for.

Q. Where did you get those notes?

A. From the records of our company, or from our secretary, Mr. Kenneth Thomas.

Q. When did you get these from Mr. [138] Thomas?

A. In the last week, I don't remember the exact date.

Q. Did you get them back there before you came out? A. Certainly.

Q. So you did have the books available at that time?

A. Not the books you asked for. The names of the officers you asked for, which you already have.

Q. But the books were available to you before you left?

A. Not the information that you asked for.

Q. Who are the officers of Gravely Pacific Company?

(Testimony of D. Ray Hall.)

A. Myself as president; Sybil Hall, vice-president; A. G. Thompson, secretary; Kenneth Thomas, treasurer.

Q. I got you, Mr. Hall, and I have Mr. Thomas as treasurer, and Sybil Hall, vice-president; A. G. Thompson, secretary. How long has Mr. Thompson been with you? Is that a Mr. or Miss?

A. Mr. A. G. Thompson. How long has he been connected with the Gravelly Pacific, Inc.? Since its inception.

Q. How long has he been connected with you?

A. With me? He has no connection with me. He is connected as counsel for the Gravelly Motor Plow and Cultivator Company.

Q. In other words, Mr. Thompson, whose position you said was secretary——

A. Secretary.

Q. Mr. Thompson, secretary of the Gravelly Pacific Company, is one of the general counsel for the Gravelly Motor Plow and Cultivator [139] Company?

A. That's right.

Q. Kenneth Thomas, whom you say is the treasurer of the Gravelly Pacific Company, is also the secretary of the Gravelly Motor Plow and Cultivator Company?

A. That is true.

Q. And Mr. D. Ray Hall, who is the president of the Gravelly Pacific Company, is the president of the Gravelly Motor Plow and Cultivator Company, is that true?

A. That is true.

Q. Will you tell the Court, please, who is Sybil Hall?

A. That is my wife.

(Testimony of D. Ray Hall.)

Q. I presume you know this: Who is the owner of the stock of the Gravely Pacific Company?

A. The Gravely Pacific Company is owned mainly by Gravely Motor Plow and Cultivator Company, an entirely separate organization, a corporation.

Q. Just a minute, Mr. Hall. I was just asking you one question, Mr. Hall, and if your attorney wants you to answer the others, he will ask you. Please answer my questions as I ask them of you. I asked you who was the owner of the stock of the Gravely Pacific Company?

A. The Gravely Motor Plow Company owns the great majority of the stock. I am also a stockholder, Sybil Hall is a stockholder, and Kenneth Thomas is a stockholder.

Q. How much stock does Mr. Thomas [140] own?

A. One share each for myself and the three individuals mentioned.

Q. In other words, the Gravely Pacific Company, the stock of that company, is owned outright and entirely by the Gravely Motor Plow and Cultivator Company except for three qualifying shares, one of which is owned by you, one by your wife, and one by Mr. Thomas, who is, in addition to his other offices, the secretary of the Gravely Motor Plow and Cultivator Company?

A. That is right, but there is only 25 or 30 shares in that Gravely Pacific Company and three of those are owned by individuals.

(Testimony of D. Ray Hall.)

Q. That was true in 1947 and 1946?

A. That is right.

Q. Since the organization of the company?

A. That is right.

Q. Is that the same setup as to the other 19 subsidiary corporations to which you referred?

A. 21 separate corporations for distributing and selling our products.

Q. And the stock ownership is the same?

A. No, they are not the same in all of them at all.

Q. It is different in the case of Gravely Pacific?

A. As far as the qualifying shares, as you call them, which represents a certain portion of those, the Gravely Motor Plow and Cultivator Company have now controlling stock in all these [141] corporations as they were established for the purpose of selling, distributing and serving Gravely Motor Plow Company's products.

Q. Mr. Hall, the Carter Company represented you out here for a great many years, did it not?

A. Periodically. And much to our dissatisfaction at times. Numerous changes were made in their distributorship due to the fact that they did not successfully handle the business.

Q. They represented you from 1925, counting the predecessor company, up to 1946, did it not?

A. No, they did not. Their contract originally was with the Gravely Motor Plow and Cultivator Company, and then this territory was allotted to L. H. Weber who was the distributor of these, and

(Testimony of D. Ray Hall.)

the Carter Company represented L. H. Weber for a certain period of time, and then Mr. L. H. Weber was replaced as a distribtuor and the H. V. Carter dealt directly with the Gravely Motor Plow and Cultivator Company for a period from 1940, due to the contract that was read here, for a period of some time. Then in 1945 when the separate corporations were formed the Carter Company became associated through Gravely Pacific Company, Inc.

Q. Do you deny you continued to deal from 1925 to 1946 with H. V. Carter Company personally yourself during this whole period?

A. No, we did not deny that. [142]

Q. As a matter of fact, you have, have you not?

A. When you say "deal," what do you mean?

Q. Correspond, negotiate, send them orders, send them letters, to go out and get business, send them invoices soliciting business and anything else comprehended under the general term of doing business with an organization.

A. The Gravely Motor Plow as manufacturers would send that material to any dealer working under any distributorship with it.

Q. As a matter of fact, you did send them during that period of time, to the Carter Company, the plaintiff in this case, did you not?

Q. During the war, Mr. Hall, the beginning of the war, you were very much concerned, were you not, with keeping alive the public demand for the Gravely product?

A. Naturally.

(Testimony of D. Ray Hall.)

Q. As early as 1942 and 1943 you continually advertised as you had previous to the war for the Gravely products, did you not?

A. Certainly any aggressive manufacturer would do the same.

Q. You urged all of your dealers, including the plaintiff in this case, to take all the orders they could, did you not?

A. I wouldn't say that, no. The dealers were informed by bulletin, some of which have been read here, as to the conditions that existed at that time. They were allowed to sell [143] tractors—I mean we did not control the dealers as to how many tractors they sold or who they sold to. The dealers working under distributorships would be at liberty to sell tractors.

Mr. Carroll: While I think of it, your Honor, my colleague reminded me, I would like the record to show that this witness is also being examined as an adverse witness.

The Court: I was wondering why there weren't objections to leading questions.

Mr. Tenney: I was going to ask if I could cross-examine him.

Q. (By Mr. Carroll): Did I understand you to say that you did not ask the dealers to sell all the Gravely tractors they could?

A. The way you state that, it would be impossible to answer a question like that, to sell all they could. The dealers were informed of conditions that existed.

(Testimony of D. Ray Hall.)

During the war period all of our production was allocated. In other words, the war production board during the war period, each manufacturer of farm machinery was restricted as to what it could make and by different limitation orders. The dealers were informed of that through bulletins, and as to the percentage of our production that we were allowed to make as to how those were distributed to dealers, of course, that was not told to them because that would depend on other factors. The distribution of farm equipment part of the time was rationed, and the rationing [144] permit was not an order for the manufacturer, but on the dealer, that if he had the material in stock he would have to deliver that. The rationing permit did not extend to the manufacturer.

Q. Did you not as early as 1942 and 1943 continually urge all your dealers, including the plaintiff in this action, to go out and take all the orders they could get for delivery after the war?

A. We did not, except under the conditions I told you in our bulletins and we had other plans that we mentioned, the buy-in-advance plan, which we urged all our dealers to take advantage of.

Q. You do not deny, do you, that you urged all of your dealers to go out and take orders for just as many Gravely tractors as they could?

A. I answered that once.

Q. Will you answer that again?

A. No, I won't answer it again. You asked if we continually urged them. I said no, except through

(Testimony of D. Ray Hall.)

our bulletins and through particular kinds of orders that we had.

Q. You admit that you urged not only the dealers but the public—you urged the public to place orders for your product as early as 1943 on the so-called buy or lay-away plan.

Mr. Tenney: Buy-in-advance plan, counsel.

The Witness: Surely we did. We urged the user to buy [145] our tractors through the dealers in ordinary conditions that existed at that time, without any promise of delivery.

Q. Didn't you tell all of them you would get them to them as fast as you could? A. Certainly.

Q. And you did not tell them that it would not be 1945, did you?

A. It would be impossible for us to have told them anything, as far as when the war would be over.

Q. But you did urge them to place orders for delivery as soon as available? A. Surely.

Q. And you urged your dealers to take all of the orders of that sort that they could get, did you not?

A. We urged our dealers or organizations to sell under the conditions that existed at that time and to sell with the understanding that the orders would be taken under the restriction that was in effect at that time.

Q. We are talking now about your buy-in-advance orders. Didn't you say to your dealers, including the plaintiff in this action, "Go on and get all the

(Testimony of D. Ray Hall.)

buy-in-advance orders that you can get for delivery when the supplies are available''?

A. I don't remember making a statement like that. That would be in our policy, of course.

Q. Do you deny that that was your policy? [146]

Mr. Tenney: Just a minute. Have you finished your answer?

Mr. Carroll: Had you finished?

A. No, I had not. The buy-in-advance plan was a plan conceived during the war period. We knew our tractor was not available to the public in the quantity that was demanded, so we conceived a plan whereby we authorized our different sales agencies to take orders, or we would take them directly in the dealer's territory, and we gave the serial number as to when that order would be delivered, but that pamphlet *plainly* the conditions that delivery would not be made until the war was over and the restrictions removed and the material available so we could bill our product. Those are not the kind of orders you mention in your bill of complaint. The Carter Company took none of those.

Q. If you will, Mr. Hall, confine your attention to the questions, I think we will get along better. The orders I am asking you about now are your orders which you are referring to as buy-in-advance orders, that is what I am questioning you about and not the orders you have just been discoursing about.

A. I beg your pardon. That is what I was explaining, the buy-in-advance orders.

(Testimony of D. Ray Hall.)

Q. I ask you once again if you did not instruct your dealers to get all the buy-in-advance orders that they could in 1943?

A. It would be our normal policy to encourage all our dealers [147] to sell on that basis.

Q. Did you not do so in 1943? I am not asking what your normal policy was.

A. I would not be able to recall back in 1943, particularly in that year that it was introduced or what not; I don't remember.

Q. You do not recall sending out bulletin after bulletin importuning your dealers to take all the buy-in-advance orders that they could in 1943?

A. I wouldn't remember right off. We sent bulletins out all during the war period. I wouldn't recall as to what particular years they refer to, but our policy was to encourage dealers to take buy-in-advance orders, yes.

Q. Don't you recall that you importuned all your dealers, including the plaintiff in this action, to go out in 1944 and take more orders than they took in 1943, buy-in-advance orders?

A. Are you referring only to buy-in-advance orders?

(Question read.)

A. On buy-in-advance orders or any orders we encouraged our dealers to take orders under conditions that existed with the explanation that delivery was not to be made, we could not deliver, as our form said, but with the idea in mind that all the

(Testimony of D. Ray Hall.)

people who would buy our product under the conditions, that they would wait until they could get delivery.

Q. Will you answer the question I asked [148] you? A. I think I did.

The Court: Read the question.

(Question read.)

A. I do not know how I just answered that, but our policy was——

Mr. Carroll: I asked you to answer the question.

A. I don't think that question can be answered "yes" or "no."

Mr. Carroll: I submit it can.

The Court: As I understand it, Mr. Hall, you have in mind efforts to secure orders in 1943. This question can be answered. Did you request your dealers to increase the orders over the number of orders they had in 1943?

The Witness: Not increase orders any more than to continue in their efforts to sell those same orders. Yes, we did that.

Q. (By Mr. Carroll): Did you issue those to all your dealers and representatives? (Handing document to witness.) I direct your attention particularly to the front page.

A. Yes, this was sent to all dealers.

Mr. Carroll: We ask that it be admitted in evidence, if the Court please, as plaintiff's next in order.

(Testimony of D. Ray Hall.)

Mr. Tenney: We have no objection, counsel.

(Whereupon the document referred to was received in evidence and referred to as Plaintiff's Exhibit No. 10.)

Q. (By Mr. Carroll): Let us see if this refreshes your recollection about whether or not you did not ask your dealers to go out [149] in 1944 and take more orders than they had taken before?

Mr. Tenney: What kind of orders are you referring to now, counsel?

Mr. Carroll: Counsel, I am talking about buy-in-advance orders.

The Court: Let us keep in mind so there won't be any misunderstanding about it. We are talking about what now?

Mr. Carroll: These buy-in-advance orders, your Honor:

"In 1943 we offered Gravely agents our buy-in-advance. Was it a success? Let's look at the record:"

Q. That is the caption of this, is it not?

A. Yes.

Q. "We asked for a deposit of \$25.00 with each buy-in-advance order. The first order was received on March 4, 1943 and by December 31, 1943 we had received over \$21,000 cash deposits on buy-in-advance orders!!

"Gravely agents have hundreds of orders on file and ready for delivery when production per-

(Testimony of D. Ray Hall.)

mits.—Uncle Sam has several thousands of dollars in war bonds that might not be otherwise.

“This is not the end of buy-in-advance orders. We are asking you to take more orders than ever before in 1944.”

Do you deny now that you asked your agents to go out and take more orders than ever before in 1944?

A. That particular bulletin answers itself. [150]

Q. I ask you if you still deny——

Mr. Tenney: Just a minute. Have you finished your answer?

The Witness: No, I had not. That bulletin is self-explanatory. As I said before, we encouraged our dealers to take more orders.

Q. (By Mr. Carroll): Have you finished your answer, Mr. Hall? A. I am through.

Q. You were not correct when you testified a few minutes ago that you did not ask your agents to go out and take more of these buy-in-advance orders in 1944.

A. As it reads there, that is the way it should be, yes.

Q. You were in error when you said previously it was not this way?

A. No, I was not in error in my statement.

The Court: I do not think the witness testified to the contrary of that.

Mr. Carroll: I got the impression he did not ad-

(Testimony of D. Ray Hall.)

mit any acceleration of this in 1944. That is the point I was trying to make.

The Court: I think we have a fencing duel between the counsel and the witness.

Mr. Carroll: I have some more of these things, if your Honor please, that I would like to come back to tomorrow, but I can save a little time if I go over them this evening, so I would like permission, if I think it wise, to return to this [151] particular aspect of the examination in the morning. I can use up the rest of the time, however, on something else.

Q. On all the orders of all characters that you received for future delivery, you sent a letter to the name of the customer that was sent in to you, did you not?

A. If we had that order. We encouraged our dealers to report their orders back to us with the name of the people they sold to, with the very idea in mind of furnishing them with the conditions that existed during the war period, as the form letter stated, that they would not expect delivery until they were available. Those acknowledgements in no way implied that the order was accepted or that the order was directed to the Gravelly Motor Plow and Cultivator Company; it was simply to inform them of the conditions that existed at that time.

Mr. Carroll: I ask that that answer be stricken as not responsive.

The Court: It may go out.

(Testimony of D. Ray Hall.)

Mr. Carroll: You did send a letter to the names of the persons who were to get these tractors, did you not?

A. We sent letters to all people, all the Gravely people—all the individuals, companies or what not who placed orders for our products, that we were advised of.

Q. As a matter of fact, you required the plaintiff in this case to send you the names of the persons from whom he had taken orders for tractors? [152]

A. We had no way to require that. We requested that.

Q. You did not require it?

A. So far as requiring is concerned, we encouraged, is a better word to use.

Q. Was it optional?

A. Surely, it was not legally required to report those orders.

Q. On other words, it was optional with Mr. Graves and, so far as you were concerned, it was all right with you if he did not send in the names of the persons from whom he took the orders?

A. He probably did not, all the orders he took at that time.

Mr. Carroll: I ask that that be stricken as not responsive.

The Court: It may go out.

(Question read.)

(Testimony of D. Ray Hall.)

A. It is difficult to answer that question "yes" or "no."

Q. (By Mr. Carroll): Was he required to do so under the terms of your arrangements with him? You can answer that "yes" or "no," I think.

A. At that particular time you refer to—what year?

Q. 1944, 1945, and 1946.

A. At that time Mr. Graves had no contract with the Gravely Motor Plow and Cultivator Company, as far as any contract was concerned, and we encouraged, would be the better word to use, him to do this, but we had no way of requiring it because he had no contract stating that he had the [153] agency.

Q. And then your answer is, he was not required to send you any names?

A. That is right.

Q. He did send, and your answer admits, that you received orders over this period from the plaintiff in this action. You know that?

A. Oh, yes.

Mr. Tenney: What periods are you referring to? I assume it is 1944.

Mr. Carroll: 1944, 1945, and 1946.

Q. You are familiar with that fact?

A. Yes, I remember those.

* * *

Q. (By Mr. Carroll): Mr. Hall, I may have asked you this before, but so it will be clear in the record, in the second [161] year of the war, January

(Testimony of D. Ray Hall.)

of '43, you told your agents to go out and get all the orders they could for delivery as soon as possible, didn't you?

A. Yes. Some questions can be possibly answered "yes" and "no." I don't think that is. State the question again, please.

Q. I asked you if, at the beginning of the second year of the war, in January of 1943, you did not go out and ask your agents to take orders for all the tractors they could get for delivery as soon as possible?

A. We encouraged them to do that.

The Court: You can answer that yes or no, and then if you desire to, you may offer some explanation.

Q. (By Mr. Carroll): Did you not ask your agents, including the plaintiff in this case, to go and do that?

A. Yes, we did. We explained that by our bulletins and by our letters and by our personal contact, the conditions which existed and the types of orders that we suggested and recommended and encouraged that they take.

Q. Well, do you mean you didn't urge them to go out and take a straight order for delivery as soon as it could be made?

A. I would say "yes," but with the explanation that I made.

Q. Well, you certainly—you say you told them certain types of orders; are there any types of or-

(Testimony of D. Ray Hall.)

ders you told them not to take? A. No. [162]

Q. In other words, you told them to go out and get all the orders they could, didn't you?

A. I say, "yes," with the explanation that I made, that I said, to take the orders that they could with the conditions that existed at that time and under the conditions that existed——

Q. Wasn't the only condition that you would make delivery as soon as you could?

A. No, that was not the only condition. The dealers could take orders with a priority rating, which would secure delivery. They could take orders under the plan we had of buying advance—a buy in advance plan—which plainly indicates as to when delivery would be made. They could also take orders of a general nature, which we encourage everyone to take, and with the understanding that delivery would be when available—but without any assurance as to when they would be delivered.

Q. But you told them to take an order for delivery as soon as possible in the later case, did you?

A. That's right, with the qualifications I have made.

Q. I show you this document here, dated January 1, 1943, on the stationery of your company, directed to all dealers and distributors, and ask you if that is one of the bulletins that you sent out to your dealers? (Handing to witness.)

A. That's right.

(Testimony of D. Ray Hall.)

Mr. Carroll: We offer this in evidence, if the Court [163] please, plaintiff's next in order.

Mr. Tenney: No objection, your Honor.

The Court: It may be admitted as Exhibit 12, I believe?

The Clerk: It is No. 12, your Honor.

(Document dated January 1, 1943, was then received in evidence as Plaintiff's Exhibit No. 12.)

Q. (By Mr. Carroll): We have discussed various things in this; I don't want to read all of them, in the interest of not burdening the record. I notice on page 5 of this bulletin you say this:

"New orders: Take just as many orders as you can. Tell everyone the true facts on delivery. In other words, no promises whatever excepting that after the picture changes naturally our backlog of orders will be filled in order.

"We don't want to slacken your efforts to sell our equipment for agricultural work. Sell the customer on the merits of the Gravely and on the thought of getting the equipment when you are able to furnish it."

Mr. Tenney: When was it?

Q. (By Mr. Carroll): "When you are able to furnish it."

"Remember also, that by cooperating in selling the D whenever you can, you are making it possible for us to furnish you with more ma-

(Testimony of D. Ray Hall.)

chines than we could Model L's. We are not going to try to hide the L from our customers. We [164] will continue to advertise this machine and we want as many prospective buyers to see it as possible. But, we will have to explain to them that our production is restricted and that seventy-five per cent of our products are going directly into the war effort."

That is what you told the plaintiff in this action in January, January 1 of 1943, isn't it?

A. That's correct. I think that is a very good analysis of the situation as it existed then.

* * *

Q. (By Mr. Carroll): Now so that you will be oriented, let me take you back to a different subject, Mr. Hall. I am showing you here Plaintiff's No. 2, for the record, and you can tell us [165] what this is, can you (handing to witness)?

A. Yes, sir.

Q. And what is it, please?

A. This purports to be a copy of an order that the Carter Company placed with us reporting a sale sold to a certain buyer of our product.

Q. And it is an order to you for shipment to the plaintiff in this action of a certain tractor, is it not?

A. That's right.

Q. And in accordance with your regular custom, when that tractor was shipped, you would draw against them on a sight draft as soon as you put it aboard in West Virginia?

A. That's right.

(Testimony of D. Ray Hall.)

Q. Now, what is the card that is attached to that? By the way, that was introduced in evidence here earlier, Mr. Hall?

A. That's right, I know about that.

Q. As typical of one of the orders we are in dispute about in this case. Now the card that is attached to that order is what?

A. That would purport to be simply an office acknowledgment from our office of the Gravely Motor Plow Company letting the Carter Company know that we had received those orders, and which would also purport to let him know that they had—or normal acknowledgement as to the copies that has been introduced before, stating the conditions under which the order was being placed.

Q. And that was your regular practice, was it? [166]

A. That is true.

Q. And letting Mr. Graves and his company know that you had sent a letter directly to the person who was named and indicated on the order as the person who was ultimately to get the machinery?

A. That's right.

Q. And I think you referred to some of the exhibits that have been introduced before here as typical of those letters, is that correct?

A. That's right. Those also pointed out that the order was placed with the Carter Company, that although we appreciated it and that delivery would be as soon as possible, and so forth——

Q. That was the same letter you sent to all persons who were indicated on orders as persons

(Testimony of D. Ray Hall.)

who were to receive machines, is that not right?

A. On all the orders that was reported directly to the factories from dealers that we had in the field. I might explain the purpose of those acknowledgments was simply——

Q. Well, what I was asking you—we will go ahead, and you can tell us the purpose if you want to.

A. Well, some of the things are hard to understand. The reason we wanted these explanations, with the names on there, was to simply try to acquaint the user with the true facts, and so that the dealers in turn would not be promising them delivery [167] when there was no hopes of making delivery.

Q. And you sent the same form letter to all of these persons?

A. Presumably so, unless it was something special that took a special letter.

Q. You sent the same letter to all the customers whose names were indicated?

A. I would presume so; I might also explain that, that on the orders as set forth in that bill, there is not all of them have the names of the users on them, by any means. I don't know how many—possibly twenty.

Q. May I have that, please?

Now this Exhibit H-H, which you say is typical of letters you sent to these persons—that is then for——

The Court: Is that your Exhibit 2?

(Testimony of D. Ray Hall.)

Mr. Carroll: I am referring now, if the Court please, to Defendant's Exhibit H-H.

The Court: Oh, pardon me.

Mr. Carroll: Which the witness says is typical of the letters sent to the persons who were ultimately to use the Gravely.

Q. You end up this way:

"Indeed, you have chosen wisely. And, you will again be wise in waiting until you can get a Gravely knowing full well that we will supply it just as soon as it is possible." [168]

* * *

Q. You did tell them in that letter that you would ship the Gravely as soon as possible, did you not?

A. That is mentioned in that paragraph. The paragraph above that there mentions another point which should be seen here, though.

Q. Well, did you not say to them in that letter——

A. You can't take one paragraph, when it is explained to by another paragraph and expect an answer.

Q. Would you let me finish the question, Mr. Witness, please? You did say to them in the closing paragraph of that letter [169] that you will ship their Gravely as soon as possible, did you not?

A. I said that, and I said in the other paragraph there——

The Court: Answer the question.

(Testimony of D. Ray Hall.)

A. Yes. May I explain as to what is explained in the other paragraph, what is explained in that?

The Court: If you want to explain, you can.

A. (Continuing): And it mentioned up here,

“And now, with a greater need than ever before for our equipment, our production is restricted. Also our agents have a great many unfilled orders accumulated from past years. So, we are not able to take care of all the orders placed with us.”

Q. That is your explanation now. Have you finished, Mr. Hall?

A. That is to answer your question, whether we promised him delivery.

Q. Now, in your other letter, which is Defendants' No. I-I, which your attorneys have introduced in evidence and which you say is the form letter you sent to all of these names that were sent to you, would you like to look at it? (Handing to witness.)

A. You might——

Q. I would like to ask you a question or two about it.

A. It is all right; I remember it.

Q. All right. And I will ask you if this second letter, if in this second letter, you did not say to your customers, [170]

“However, you can be certain that your order will be shipped just as soon as possible.”

Did you not say that?

(Testimony of D. Ray Hall.)

A. That's right, that's right, yes.

Q. And I ask you if you did not say to the persons to whom you sent these letters, being the persons who are named, whose names are indicated on these orders,

“In accepting your order, we call your attention to the facts which we list as follows:—”

and one of these is,

“The order is placed with the understanding that we will fill it as quickly as possible. We can not recognize any promised or implied time of delivery.”

Did you not tell that to the persons whose names are indicated on these orders?

A. Those form letters were sent to the persons that was possibly indicated on the orders. [171]

* * *

Q. (By Mr. Carroll): As a matter of fact, Mr. Hall, it is true, is it not, that you did accept all of these orders for delivery as soon as you were able to make them? A. That's right.

Q. You told the customers that, and you told your dealers that, did you not?

A. That's right, with the qualifications as pointed out in the rest of the letter.

Q. Now, in regard to the orders in suit here, which Mr. Graves placed with you, you never wrote to him that any of those orders were not accepted, did you?

(Testimony of D. Ray Hall.)

A. I don't recall any specific letter; we informed our dealers by bulletins and cards.

Q. You have gone over your correspondence with Mr. Graves quite carefully for this lawsuit, haven't you?

A. No, I haven't.

Q. You never wrote to him that the orders were rejected, did you?

A. I wouldn't have no memory.

Q. Now, if I can, so that you will be properly oriented, direct your attention to another matter, Mr. Hall: I thought you said something yesterday about your dealings with Mr. Graves' company being interrupted after Gravely Pacific was set up out here. [172] I didn't quite catch what you said, but you didn't mean to tell the Court that you yourself did not continue to deal directly with Mr. Graves after this subsidiary of yours was set up out here, did you?

A. I did mean that, but that would again have to be explained. It doesn't mean we haven't made direct shipments in this territory. Our relationship with the Gravely Pacific organization is as a distributor, and our other distributors and individual distributors, we used to have, was in the way of a contract. And that that contract provides that where a dealer buys his equipment directly from the factory, that the distributor receives a commission on that. So to the extent that we ship tractors in here during that time, that we shipped tractors, or in other territories, to dealers, we did; our relationship

(Testimony of D. Ray Hall.)

however, as to the contract, would not be with us, but with the distributors.

Q. All right. Now let me ask you the question: Tell the Court, please, whether, during 1945, after this subsidiary of yours was set up out here, you did or did not continue, yourself, to deal directly and personally with Mr. Graves?

A. To answer that question, what do you mean by "deal"?

Q. Did you not correspond directly with him during 1945?

A. And '46. Surely; we correspond with all our dealers.

Q. And you did, yourself, personally, with Mr. Graves, did you not? [173]

A. Possibly so; or maybe some official of the Gravely Motor Plow & Cultivator Company.

Q. You wrote to him that you were establishing a branch in Los Angeles, did you not?

A. I would have no recollection of the mention of a branch.

Q. Perhaps I could refresh your recollection.

I hand you here a letter, Mr. Hall, purporting to bear your signature on the letterhead of the Gravely Motor Plow & Cultivator Company, dated June 4, 1945. (Handing to witness.) Will you read that, please, or glance at it, and see if you can identify it?

A. Yes, that's right, that letter was sent.

Mr. Carroll: We ask that this be admitted in

(Testimony of D. Ray Hall.)

evidence, if the Court please, as Plaintiff's next in order.

Mr. Tenney: No objection.

The Court: It may be admitted as Exhibit No. 13, Plaintiff's No. 13.

(Letter referred to above, dated June 4, 1945, was then received in evidence as Plaintiff's Exhibit No. 13.)

Q. (By Mr. Carroll): In that letter did you not, yourself, personally write to Mr. Graves that you were setting up a branch in Southern California?

A. Didn't you read the letter, and didn't it say it is the equivalent of a branch?

Q. All right, the equivalent of a branch. Did you not write [174] personally and tell him you were setting up the equivalent of a branch?

A. At that time, at the time that letter was written——

Q. You personally wrote to him during this year, did you not, about what you allege you required in the way of a separate building for Gravelly?

A. I don't recollect of any letters of that type.

Q. Do you deny that?

A. I don't deny it. I say I don't recollect it.

Q. You don't mean that you haven't any recollection now of writing repeatedly to Mr. Graves about this matter?

A. I write a great many letters, and in 1945—that is three years back. I would have no recollection. If you want to call a particular one to my

(Testimony of D. Ray Hall.)

attention, I could tell you if I remember writing it.

Q. Let me ask you this: You don't deny that you dealt directly with this company during the year 1945 and the year 1946, do you?

A. I deny that; you will have to explain the word "deal." We had no contract with them.

Q. Did you not carry on business directly with this plaintiff company in 1945 and in 1946?

A. We——

Mr. Tenney: By "you," who do you mean? Will you make it fairer, counsel? [175]

Q. (By Mr. Carroll): I mean the gentleman on the stand and the Gravely Motor Plow & Cultivator Company.

Mr. Tenney: Well, the gentleman on the stand, if your Honor please, is president of two companies in this case, and I would like to have counsel——

The Court: Will you remove any doubt, if there is any, about that?

Mr. Carroll: All the letters, all of the correspondence, your Honor, is on the letterhead of the Gravely Motor Plow & Cultivator Company, one of the defendants in this action, of which this witness is the president, and he signs all of the letters as president.

The Court: Well, just frame your question, if you can, Mr. Carroll, to meet the suggestion.

Mr. Carroll: All right.

Q. Mr. Hall, did not you, as president of the Gravely Motor Plow & Cultivator Company, and

(Testimony of D. Ray Hall.)

did not the Gravely Motor Plow & Cultivator Company, have business dealings directly in regard to the dealership with Mr. Graves' company through 1945 and 1946?

A. If it was done so, it was done with——

Q. You can answer that yes or no, I think, and then explain it.

A. Might I ask a question there? What do you mean by "deals"?

The Court: You answer it yes or no if you can.

A. No, as far as our dealings were concerned, I qualified that [176] then by saying then that we possibly no doubt made statements to that territory. We wrote them as to things that should be done, but their distribution point was through our established distributor, the Gravely Pacific of California.

Q. Do you deny that you billed them directly?

A. No.

Q. You did bill them directly?

A. That's right, and gave commissions to the Gravely Pacific. [177]

* * *

Q. Now, if I may take you to another subject, please, Mr. Hall, there weren't very many of these tractors available during the war years, was there?

A. Yes.

Q. There were or there weren't?

A. We manufactured tractors. You mean of our make or one of the other makes?

Q. Your make.

(Testimony of D. Ray Hall.)

A. We manufactured our tractor continually throughout the war years. [186]

Q. But the supply was very limited?

A. Our records of sales, from memory, would show that we sold a greater number during the war period than we did previous to the war period.

Q. But the supply in relation to the demand upon the dealers was very limited, was it not?

A. That condition still exists.

Q. I am asking if it wasn't true during the war.

A. It is true during the war and it is true now.

Q. And your dealers all wanted more tractors than you could supply to them?

A. It is impossible to say that all wanted that. It would depend on the dealer. We haven't many dealers.

Q. But the plaintiff in this case wanted more tractors than you could supply to him?

A. At that time, yes.

Q. During the war—is that not true?

A. Yes, true.

Q. It was true in 1946 up to the time you attempted to terminate his services?

A. That is true.

Q. And of course he didn't get the tractors he wanted during the war, did he?

A. You are asking me as to how many he wanted. I don't know how many he wanted; he didn't get the tractors he ordered, no. [187]

Q. And he didn't get any others either, did he?

A. I—no.

(Testimony of D. Ray Hall.)

Q. And as a matter of fact, you were quite sure he could have sold many, many, many times the tractors you allocated to him, aren't you, during the war?

A. The answer would be my opinion—that would be that he could—just as automobile dealers could have, too.

Q. And now also during the war, Mr. Graves performed services for your company, did he not, the Gravely Motor Plow & Cultivator Company?

A. Mr. Graves—the answer would be “yes,” Mr. Graves continued to handle the product as a dealer without contract, and he performed services in this respect that had been out in use in that territory, and presumably he had sold them or anybody had sold—they were able to go to him to secure repairs, which he charged them for, and serviced the machines. There is no doubt of that.

Q. He services all of your Gravely tractors that came to him for servicing from Northern California during the war years?

A. I would presume he would have, since he made a profit on it.

Q. He investigated all the rather large number of prospects that you sent to him for investigation?

A. I am afraid that he didn't. In fact, it would have been an impossibility for any of our dealers to have investigated all prospects since during the war. [188]

(Testimony of D. Ray Hall.)

Q. You sent to him prospects continually during the war? A. Without a doubt.

Q. All during the war years, and you asked him to investigate, did you not?

A. Without a doubt.

Q. He took care of buy in advance orders for you that had gone directly to your factory, did he not?

A. That would be from memory—I don't recollect that he did or not. I do recollect that he wouldn't take buy in advance orders, which we take and recommend to be taken.

Q. I didn't ask you that. A. Pardon me.

Q. I asked you if he didn't take care of the buy in advance orders you had at the factory for Northern California Area?

A. My present recollection, I don't recollect of there being any such orders from Northern California.

Q. If there were any, he would have taken care of whatever installations were necessary when the tractor arrived, is that right?

A. That would be the assumption.

Q. He maintained parts out here, did he not?

A. That's right.

Q. All inquiries which you received during the war years in response to your national advertising, from Northern California, you sent out here to Mr. Graves' company for handling, did you [189] not?

A. That would be presumed to be correct, yes.

(Testimony of D. Ray Hall.)

Q. What do you mean that it would be presumed to be? You did, did you not?

A. I could say we sent all the inquiries out here. Our normal procedure would be, if we had any inquiries from any territory, we would refer them to the dealer.

Q. And that is what you did for the Northern California Area, is it not?

A. That is presumably so.

Q. And now, Mr. Hall, when you decided that you didn't need Mr. Graves any more at the end of the war, you then attempted to deprive him of the commission or profit on the orders he placed with you and which you have bound yourself to send, and which you have told the customers would be sent just as soon as conditions permitted?

A. We did——

Mr. Tenney: May I have that question, please?

The Court: Would you read that question back, Mr. Reporter?

(Record read.)

Mr. Tenney: I object to the form of the question, your Honor, as assuming something not in evidence.

The Court: The objection will be sustained.

Mr. Tenney: And it is complex.

Q. (Mr. Carroll): You did attempt to deprive Mr. Graves' [190] company of the commission on the orders he placed with you during the war?

A. We did not.

(Testimony of D. Ray Hall.)

Mr. Tenney: I object to that.

The Witness: Pardon me.

Mr. Tenney: The question has been answered, your Honor.

Q. (Mr. Carroll): You say you did not?

Mr. Tenney: I object to the question as being argumentative.

The Court: Well, he has already answered it. Let it stand. [191]

* * *

A. I wouldn't deny that he reported them to me.

Q. As a matter of fact, do you deny that you yourself, personally, wrote to Mr. Graves and told him that his agency was terminated?

A. I wouldn't deny that.

Q. Do you deny that you told him that he should tell the customers for whom he had orders that he no longer had the agency for your factory?

A. No, I wouldn't deny it.

Q. Then you don't deny that you told him that these customers should be given the opportunity of getting their order filled from some other dealer?

A. I don't remember the exact language; that would be the normal assumption, that he was told he couldn't receive tractors.

Q. Well, isn't it true that you sent this letter, which is your counsel's and your own Exhibit No. B-B? This is dated September 5, 1946, and it is on the stationery of the Gravely Motor Plow & Cultivator Company, addressed to D. E. Graves, and the H. V. Carter Company, Inc.:

(Testimony of D. Ray Hall.)

“Dear Mr. Graves:

“It is right that I should reply to your letter of August 30th addressed to the attention of Mr. [196] Thomas, for I so well recall my conversation with you back here when you visited us. I think I was quite plain in telling you what the Gravely Pacific or the Gravely Motor Plow either would require in case we would continue with you.”

You said that to him, didn't you?

A. That's right.

Q. And when you were talking about what either the Gravely Pacific or the Gravely Motor Plow would require in case “we would continue with you,” you were talking about the continuation of his agency for the Gravely Motor Plow & Cultivator Company, were you not? A. Yes.

Q. And did you not say this to him:

“As pointed out you had hold of too many competitive lines and that you could not expect us to continue unless you did certain things.”

When you said “us,” you meant the Gravely Motor Plow & Cultivator Company, did you not?

A. I meant that, and I must explain that, that the Gravely Motor Plow Company corresponds directly with the dealers, although there are contractual relations with the Gravely Pacific Incorporated, in this territory.

Q. “One of these was to put a separate store and organization on Gravely alone. You

(Testimony of D. Ray Hall.)

hedged on this, but finally [197] promised in an indirect letter that you would. Now Mr. Heinen reports that you had not done this and it was upon my suggestion that he notify you that you could not continue."

You did tell Mr. Heinen, did you not, to terminate the relationship?

A. That's right, that was discussed at our directors' meeting, and it was determined upon.

Q. Well, you told Mr. Heinen, did you not?

A. Yes.

* * *

A. That letter is addressed to H. V. Carter Company.

Q. And please tell us on whose stationery it is?

A. That is the Gravely Motor Plow & Cultivator Company.

Q. And you signed that letter as president of that company, did you not? A. That's right.

Q. You say nothing in this letter about acting as the president of the Gravely Pacific Company, do you?

A. No, that naturally would come from Los Angeles.

Q. Will you answer my question, please? [198]

A. Nothing said in that letter; but my letters to Gravely from Gravely Pacific will be from, addressed from, Hollywood.

Q. You wrote this letter as president of the parent company, the Gravely Motor Plow & Cultivator Company? A. That's right.

(Testimony of D. Ray Hall.)

Q. "I am sending a copy of this to Mr. Heinen and I am suggesting to him that he attempt to secure another dealer in that area."

You told Mr. Heinen that, did you?

A. That's right, and the Gravely Pacific had secured a very excellent dealer in his [199] location.

* * *

Cross-Examination

By Mr. Tenney:

Q. Mr. Hall, you were familiar with the order that was sent to Gravely Motor Plow & Cultivator Company in 1943 for thirty tractors?

A. Yes, yes.

Q. And that order is one of the orders that is in evidence here?

A. That's right.

Q. And that is one of the orders that makes up this alleged claim of 122?

A. That's right.

Q. Were there any names of any dealers or any purchasers that were sent to you by the dealer in connection with that order?

A. There was not.

Q. And in reference to the order for 45 tractors which was delivered to Gravely Pacific in July of 1945, that order was [202] subsequently received at the factory also, was it not?

A. Yes, it was. The date was 1946, instead of '45.

Q. Forty-six. I beg your pardon.

A. The reason I recall that is our looking at those exhibits there, and it shows that that order,

(Testimony of D. Ray Hall.)

while sent to the Gravely Pacific and dated July 3, that a copy was sent to us and received on September 6, if I recall, 1946, after the cancellation of the relationship with the Carter Company of the Carter Company with the Gravely Pacific.

Q. On August 23 of 1946?

A. The order was received in September.

Q. I am referring to the letter of Mr. Heinen, sent to Mr. Graves on August 23, 1946.

A. Yes.

Q. And in connection with that order, for the 45 tractors, which I believe would constitute a carload, were there any names of any purchasers that accompanied that order?

A. No, there was not.

Q. Now you stated in your cross-examination, I believe, Mr. Hall, that you recommended to Mr. Graves that on all orders that he could, that he received during the war, that he send the name of the prospective purchaser, is that right?

A. That's right, and if I may explain again, the reason for that was not in acceptance of the orders such as, so that we in turn as the manufacturers would protect our reputation, and try to [203] encourage the people who placed the order for tractors, so that they would wait until it would be possible to secure our particular make of tractor. And that those names were encouraged for that reason, and that the letters that have been referred to here as form mimeographed letters, which attempted to state those conditions.

(Testimony of D. Ray Hall.)

Q. Now, Mr. Hall, bearing in mind the order in July of 1946 and the order of 1943 that I have referred to, of 30 tractors and 45 tractors, how many would be the most orders that would have contained the names of the customers that are involved, or the claim as made by Mr. Graves in this case?

A. I am sorry. Will you restate that? I didn't quite understand it.

Q. Maybe my question isn't quite clear.

The order in 1943 for 30 tractors and the order in 1945 for 45 tractors, no names were sent for purchases?

A. That's right.

Q. And the total claimed orders in this case is 122, is that correct?

A. That's right, that's right.

Q. So that the most orders that you could have received the names of the prospective purchasers would be 47, is that correct?

A. That's right.

Q. And did you receive the names of the purchasers in all of those 47 orders? [204]

A. Why not nearly all of them. There is a certain percentage that had the county those were to go to instead of the name of the buyer.

Q. Now, counsel for the plaintiff, Mr. Hall, has referred to two of the exhibits in this case, Defendants' I-I, which as you recall, is the form letter?

A. Yes.

Q. And also that you testified that that is the form, that letter, that was sent to the prospective

(Testimony of D. Ray Hall.)

purchasers whose names were furnished you; is that correct (handing document to witness)?

A. That's right.

Q. And you are familiar with this?

A. That's right.

Q. And with the second page of it. I direct your attention to the portion of the second page which counsel has read, which reads as follows, and this is paragraph three:

"The order is placed with the understanding that we will fill it as quickly as possible. We can not recognize any promised or implied time of delivery."

Now that notification was given to these prospective purchasers whose names were furnished you, is that correct? A. That's right, yes.

Q. I will also read paragraph one of this same page. That was paragraph three which I just directed your attention to. [205]

"Due to government restrictions, we can not guarantee delivery of the equipment on your order."

That was also included in the notification that was sent to the prospective purchaser, is that correct? A. Yes, sir.

Mr. Carroll: Where is it you have just read, please?

Mr. Tenney: Paragraph one.

Mr. Carroll: Thank you.

Q. (Mr. Tenney): Now counsel has also re-

(Testimony of D. Ray Hall.)

ferred to Defendants' Exhibit H-H, and I will direct your attention to it again. It is a letter from Mr. Graves, addressed to the Gravely Motor Plow & Cultivator Company, dated January 10, 1944. Attached is a copy of a form letter which was sent to Mr. Dowler, whose name is on this order, that being one of the orders taking up a portion of the 122. You are familiar with that? (Handing to witness.) A. Yes.

Q. And in this document counsel read the last paragraph:

"Indeed you have chosen wisely. And, you will again be wise in waiting until you can get a Gravely knowing full well that we will supply it just as soon as it is possible."

You recall that was in this form notice that was sent out? A. That's right.

Q. I will also read to you, or direct your attention and read [206] to you, paragraph two of the letter:

"For twenty-one years the Gravely has been filling the needs of small power users throughout the entire world. Even in the midst of the depression there was a steady demand for the Gravely. For years our sales have been ahead of production. And now, with a greater need than ever before for our equipment, our production is restricted. Also our agents have a great many unfilled orders accumulated from past years. So, we are not able to take care of all the orders placed with us."

That was included in the notification that was

(Testimony of D. Ray Hall.)

sent to prospective purchasers whose names were furnished to you? A. That's right.

Q. And you say that those notifications were sent to less than 47 of the prospective purchasers whose orders were obtained by Mr. Graves?

A. That's right, yes, sir.

Q. At the commencement of the war, which started on December 7, 1941—during the year 1942—how much of your production was curtailed?

A. At the first limitation orders, as I recall, we were allowed to only build 26 per cent of our former sales for agricultural production. However, that same order stated in it that orders with a priority rating for government work for war purposes, our standard product, could be produced, providing first that [207] these orders were submitted to the War Production Board and a proper authorization given.

Q. And when did that change during the period of the war?

A. Well, that limitation order was amended and possibly a new one added, but throughout the war the farm machine industry operated under a limitation order and conditions would vary as to the percentage allowed to be built for agricultural purposes and some products were allowed to be built for war purposes.

Q. On a national scale, Mr. Hall, are you able to state to his Honor what percentage of the orders obtained by your dealers during the war proved to be authentic at the end of the war?

Mr. Carroll: We will object to this as incompe-

(Testimony of D. Ray Hall.)

tent, irrelevant, and immaterial, if the Court please, and having no bearing on the issues in this case; just what we are concerned about, I take it, your Honor, particularly in this case, may it please the Court, where these orders were to be shipped against sight draft, which gave the payment to this defendant directly when he put—for the full amount of his bill—directly when he put them on the freight cars in West Virginia. Now what has happened to other orders by some other dealers or other persons throughout the United States,—

The Court: The objection will be overruled. You may answer the question.

The Witness: Will you say that again, [208] please?

Mr. Carroll: Would you read the question?

(Record read.)

A. To explain that, I must first mention that we had different types of orders. First, orders that we are allowed to fill with a priority rating, why, we billed and delivered those during the war period to dealers that had secured those orders. Then the third type of orders that I mentioned, that we encouraged dealers to receive and report to us, why, we found that with few exceptions, dealers throughout the United States would secure a tremendous backlog of orders, and that all those orders after the war, as it developed, after the war was over and an attempt was made to deliver those, that there hasn't been of those particular orders, there

(Testimony of D. Ray Hall.)

hasn't been over 8 per cent of those that were bona fide orders, because every dealer would have a tremendous quantity of orders, because at that time everybody was looking for small tractors, and as far as going out and taking orders, it would be almost unlimited. And that that was why we attempted to get our dealers to comply with our policy of selling only orders that would be bona fide orders, by selling on our buy in advance plan, and by taking deposits on orders. After we would attempt to screen those orders to make sure those were bona fide orders, some of the orders that was of the type mentioned in this bill of complaint, it would be fortunate if there was even 8 per cent of those that would be bona fide orders, and of which [209] delivery was made. [210]

* * *

Q. I direct your attention, Mr. Hall, to Gravely bulletin—to all agents, which is Defendants' Exhibit No. D-D, dated June 10, 1945. In paragraph four of this bulletin, it reads as follows:

“It is our aim to take care of demands for Gravelys during 1946. To do this our production must be increased in a substantial way. Many details as to new plant, machinery and manpower are to be worked out. Details supplied later. It will be wise to start now booking orders (along lines we will later suggest) and reviewing ones already taken.” [211]

Is that one of the directions you sent out to dealers?

(Testimony of D. Ray Hall.)

A. That's right, and the date will give the date on that bulletin.

Q. That is June 10, 1945? A. 1945.

Q. Also in this bulletin that I just referred to, Mr. Hall, paragraph six reads as follows:

“A new plan for booking orders. Out of this increased production we hope to allot a known number of tractors to each agent. Then, a plan worked out on a national basis will be offered so that each agent can book orders, with deposits, for delivery during 1946. Old orders can be reinstated on forms first. This will include complete sales promotion to induce prospective buyers to wait for the Gravely a short while longer. Allotments to agents will be based on number of orders booked in this manner.”

That was the information that was also sent to the dealers? A. That's right, the same date.

Q. I will ask you: To your knowledge, Mr. Hall, did Mr. Graves ever screen the orders that he would submit to you during the war?

Mr. Carroll: We will object to this as calling for the opinion and conclusion of this witness about what someone else did. [212]

The Court: The objection will be overruled.

A. Not to my knowledge.

Q. (By Mr. Tenney): Did Mr. Graves ever submit, to your knowledge, any orders with deposits? A. Not to my knowledge.

Q. Did Mr. Graves ever submit any buy in advance in orders? A. Not to my knowledge.

(Testimony of D. Ray Hall.)

Mr. Tenney: Excuse me, your Honor.

Q. (By Mr. Tenney): Did Mr. Graves ever submit any forms reinstating old orders obtained by him?

A. Not to my knowledge.

Q. Mr. Hall, have you examined your records to find out how many tractors were sent by the factory to California during the years 1945 and '46?

A. I have your letter on that question. I have it.

Q. And will you state to his Honor, please, how many tractors were sent to the distributor in California, which was the Gravely Pacific, in 1946?

A. 1946 was 164 tractors.

Q. And in 1945 how many? A. 40. [213]

* * *

Redirect Examination

By Mr. Carroll:

Q. Do you have in your records now, and can you find out for the Court, the number of tractors that you sent into California in [220] 1947?

A. In 1947 our shipments were to the Gravely Pacific. This shows it as 257.

Q. I am talking about the State of California.

A. And as far as any other shipments there, this record doesn't show. But my memory would be that there wouldn't be, except in some isolated cases, of a single shipment or so—it might be a buy in advance order or something like that.

Q. Do your records—you said you might be able to find something out from your records here; do your records that you have here enable you to tell

(Testimony of D. Ray Hall.)

his Honor how many tractors were shipped from your factory either through Gravelly Pacific or otherwise into the State of California, for California?

A. They do not, except in the explanation I have made.

Q. I presume that Mr. Heinen's records will show that, will they? A. Possibly so.

Q. At all events, you did send Gravelly Pacific 257 in 1947? A. That's right.

Mr. Carroll: 257?

The Witness: That's right.

Mr. Tenney: That's right.

Q. And you sent Gravelly Pacific 126 in 1946?

A. 164.

Q. 164. And you are steadily increasing your production all [221] the time, and were then?

A. That's right.

Q. Will you tell his Honor how many of those 164 and 257 were sent to the plaintiff in this action?

A. My record doesn't show that.

Q. Now as a matter of fact, there is a big difference between these buy in advance orders and the type of order that Mr. Graves placed with you, is there not? A. That's right.

Q. A buy in advance order is an order that your factory sells directly out here, or an agent sells directly for your factory, and a contract is in the name of the factory with the man on the farm who wants to get the tractor?

A. That's right, that was——

(Testimony of D. Ray Hall.)

Q. It is a factory obligation?

A. That's right.

Q. It is an obligation of the Gravely Motor Plow & Cultivator Company?

A. That's right.

Q. And that is what you referred to as a "buy in advance" order? A. That's right.

Q. And as you have pointed out, none of the orders in suit here were orders of that character?

A. Not to my knowledge.

Q. The orders with which we are concerned here are orders which [222] the plaintiff in this action, the Carter Company, placed with you for delivery to the Carter Company, is that not true?

A. That is true.

Q. And those orders date back to 1943?

A. They date back to 1943, and if I may explain further, that the orders that the Carter Company placed at the beginning of '43 for 30 units, mentioned that that was at their 1943 and 1944 allotment, and that these other orders that was reported during that period of those times was to the Gravely Motor Plow Company's knowledge or their belief, simply a reaffirmation to the user that they was going to sell those machines to them, and hoped to sell to——

Q. The method of payment of these orders was entirely different, was it not? A. Yes, it was.

Q. In other words, on every order that you shipped to Mr. Graves, you drew against him just as soon as it got on the freight car?

(Testimony of D. Ray Hall.)

A. That could happen even on a buy in advance order, if the order was——

Q. Just a moment. Will you answer my question, please?

A. Yes. May I explain further, that on a buy in advance order——

The Court: Answer it first. Then you may explain it.

The Witness: Surely. May we start over? Could I have it read by the Reporter? [223]

The Court: Yes.

(Record read.)

Q. You weren't worried about the payment of any of those orders? A. No.

Q. They could never be delivered to Mr. Graves if the sight draft wasn't honored?

A. That's right.

Q. He couldn't get them until he paid you in full for them?

A. Our terms for twenty-five years have been solely for cash, with exceptions.

Q. Well, is it not correct in what I said, that any tractor you sent to Mr. Graves, he had to pay in full for it before he got it?

A. Yes, that's right—any dealer that buys from us.

Q. You had no worry of his accepting and paying for every order he placed with you?

A. That's right.

(Testimony of D. Ray Hall.)

Q. And you know perfectly well he could have sold every single tractor you sent him?

A. Well——

Q. Did you not?

A. In fact, unless he beat them off with a club during that period of years, he would have a difficult time to keep from selling them. [224]

Q. So as to every single one of these orders you received and acknowledged receiving from the plaintiff in this action, you would have been paid before they left the freight car? A. Yes, yes.

Q. Regardless of whether Mr. Graves had taken any deposit or not from the customer?

A. Yes.

Q. Now as a matter of fact, isn't it true also that it was left up to Mr. Graves how to distribute the tractors that he got?

A. Not entirely; it was left up to him as far as the agricultural orders that he would receive. On rated orders and on buy in advance orders, if any existed, it was our duty and responsibility to see that those were delivered to the particular customer called for.

Q. As a matter of fact, you didn't have but very few buy in advance orders in Northern California, did you?

A. From memory, I would say there is probably none.

Q. Negligible? A. That's right.

Q. So, therefore, how Mr. Graves distributed the

(Testimony of D. Ray Hall.)

tractors that he had ordered from you was his business, by and large, wasn't it?

A. Excepting the number of rated orders that were sent in that time. I don't remember the exact numbers.

Q. Well, apart from the rated orders. [225]

A. That were sent to him, and he distributed, presumably, to those people.

Q. Apart from the rated orders, was that not true? A. That's right.

* * *

Q. (Mr. Carroll): Apart from the rated orders and any preferred delivery orders, it was the responsibility of the plaintiff in this case to whom he should distribute the tractors that you sent him on his orders to you? A. That's right.

Q. Your contract with him as to all of these twenty-two orders was between your company and himself, not with the ultimate user to whom he might resell it? A. That's right.

Q. And when you say that there was no commission arrangement, you don't mean to tell his Honor that the commission or profit, [226] whatever you may call it, was not 30 per cent of the list price, the same as with all your other dealers?

A. As far as the commission arrangement, but don't overlook the fact that at that time the Carter Company was a dealer and in business for himself, and at that time he secured a discount.

Q. But did not the Carter Company have the

(Testimony of D. Ray Hall.)

same discount that all your other dealers all over the United States had, of 30 per cent?

A. That's right.

* * *

Q. Now as to each of those individual names, it was your custom and procedure to accept them and send them the form letters which had been identified in evidence here as H-H, and I-I? [227]

A. Yes.

Q. Is that not true? A. That's right.

Q. And in those letters you told them that you were accepting those orders, were you not, subject to delivery as soon as you could make it?

A. Subject to all the provisions and the conditions outlined there.

Q. And you told him: "In accepting your order, we call your attention to the facts which we list as follows:—"

That is true, isn't it?

A. In accepting the orders, that is a mimeographed order form. I mean, a mimeographed form, used in all of them, and the orders were not placed—in a few cases I would say with us, but the orders were placed with the dealer.

Q. Yes?

A. That was simply a notification of the fact that the order had been placed.

Q. Well, whose order were you accepting?

A. As far as accepting the order of any of them, we wasn't accepting any of them, as far as accepting an order.

(Testimony of D. Ray Hall.)

Q. Do you mean to say when you wrote this to the person whose name you had been given as one who was to receive a tractor ordered from you by the plaintiff in this case, that when you said "in accepting your order," you weren't accepting [228] any order?

A. If that was an order, as sent by a dealer, as in this case, to us, our form there used on that would not have been proper. The order was never placed directly with us, it was with the dealer.

Q. Didn't you tell us that you sent the letter, the same letters, to all of the people placing orders?

A. That's right.

Q. And in the letter you sent to each of these people whose names Mr. Graves sent to you, you said, "The order is placed with the understanding that we will fill it as quickly as possible. We can not recognize any promised or implied time of delivery." And later on, you say, "Every effort will be made to get it to you as quickly as possible."

You accepted those orders that Mr. Graves sent you with the intention of fulfilling them as soon as possible afterwards, did you not?

A. We didn't accept the orders, excepting as I have qualified this. We hoped to furnish tractors to dealers after the war and as we are, and which we have issued bulletins explaining the conditions as to how we attempted to allocate our production, our increased production, according to the way that that dealer in turn would follow out our policies and do things which we knew was for the benefit of them,

(Testimony of D. Ray Hall.)

and for ourselves; and as to the amount of activity, the manpower, facilities, [229] service facilities, and so many things that goes into judging as to whether a dealer is effective or not. Those type of dealers that did that do receive larger allotments.

Q. You accepted these orders for delivery after the war, did you not, or during the war if conditions permitted?

Mr. Tenney: If your Honor please, I am going to object to that question as calling for the conclusion of the witness. I think——

The Court: The objection is overruled.

A. When you use the word,——

Q. (By Mr. Carroll): I think you can answer that question directly, yes or not.

A. State the question again.

Mr. Tenney: Then explain, if you want.

The Witness: State the question again.

The Court: Would you read that back, Mr. Reporter?

(Record read.)

A. Yes, with this explanation: That as far as accepting the order is concerned, it is doubtful in my mind if the orders were accepted. We encouraged the placing of orders by all of our dealers, and we tried to notify the customers in turn as to the conditions existed. We had put out bulletins, printed letters on that, so that the ultimate users in turn would know that there was no implied delivery, no promised delivery, or whatnot. And as far as accepting the order is concerned, it [230] is impossible to say

(Testimony of D. Ray Hall.)

whether we accepted the orders, concerning which we notified them as to conditions of the order that had been placed with the dealers.

Q. Now if I may direct your attention to the other class of order here, the order for the 25 tractors and the 45, those would have been shipped the same way, would they not? You would have gotten your payments for them before they got off the car?

A. That's right.

Q. So that regardless of any deposit, you had no risk whatsoever, as far as getting your pay?

A. No.

Q. Now as far as this—withdraw that, please.

You never told the plaintiff in this action that you wouldn't fill those orders?

A. I don't recollect any more than the evidence has brought out.

Q. You never notified them the orders were not accepted?

A. We never. I don't recall any specific notifications excepting as I have pointed out before; our notification to our whole organization was through bulletins, which he presumably received.

Q. You never wrote to Mr. Graves, or the plaintiff in this action, that these orders would not be filled?

A. I don't recall. [231]

Q. As a matter of fact, you told him, or your organization has told him, that on occasion he may expect the D tractors that he had ordered from you?

A. Possibly so. [232]

(Testimony of D. Ray Hall.)

Recross-Examination

By Mr. Tenney:

Q. Mr. Hall, the tractors involved in this action are of two types, isn't that correct?

A. That's right.

Q. And what are those types?

A. We refer to them as our Model D tractor and Model L tractor. The Model D tractor is one that we manufactured for much longer. We previously manufactured it beginning back about 1928.

Q. And when, Mr. Hall, if you will tell the Court, please, did you last manufacture—that is by “last manufactured” I mean the factory at Dunbar—when did you last manufacture D tractors?

A. About the best of my recollection, we discontinued the manufacture of the D Model right around the war years, starting in [236] 1942, due to the fact that the amount of material we could secure was limited, and we had to choose. We felt it was better to take the material to manufacture one model.

Q. Which is the larger tractor, the D or the L?

A. The Model L.

Q. And you say that you discontinued, to the best of your recollection, the manufacture of the Model D around 1942, is that correct?

A. That's correct, and we have not since that time manufactured that model at all, nor we do not manufacture it today. However, this particular model is manufactured by a different company that we own some stock in, in England.

(Testimony of D. Ray Hall.)

Q. At the present time, and since the discontinuance of the manufacture of the Model D at Dunbar, the only place that the Model D is manufactured is in England, is that correct?

A. That's correct, excepting, I might make this amendment to my other statement; as to the fact that there possibly would have been some surplus parts left over from the Model D, that those might have been assembled. That is a small, limited quantity assembled during the war years.

Q. After the discontinuance of the manufacture mainly of the D tractors that you have testified to?

A. That's right.

Q. There may have been a few that have been manufactured here?

A. That is possible. [237]

Q. Otherwise, the only place, as I understand your testimony—and correct me if I am wrong, Mr. Hall—is in England, is that right?

A. That's right, yes.

Q. Direct your attention, Mr. Hall, if you will, to Defendants' Exhibit No. F-F. That refers, does it not to 25 D tractors?

(Handing to witness.)

A. That's correct.

Q. And what is the date of that order that was received from Carter Company?

A. June 28, 1943.

Q. And that includes 25 Model D's and 5 Model L's?

A. That's right.

(Testimony of D. Ray Hall.)

Q. In addition to those 25 Model D's, are there other Model D's making up this number of 122?

A. That's right. I believe there was a total of four more Model D's on that bill.

Q. In addition to that? A. That's right.

Q. Making a total of 29 Model D's?

A. That's right.

Q. Mr. Hall, will you state to the Court, please, how many Model D's you have received, and by that I mean the Gravely Motor Plow & Cultivator Company or any of your distributors; how many Model D's have been received since the end of the [238] war?

A. We have received a total of 25 Model D's, to the best of my recollection, which was received in the year 1947.

Q. And those were received from England?

A. That's right.

Q. And how many of those Model D tractors, Mr. Hall, to your knowledge, have been delivered in California?

A. We attempted to distribute those over the various sections of the country, and to the best of my recollection, it was three sent to the Gravely Pacific, Inc.

Q. Mr. Hall, I will ask you, if this offer which you received or the order which you received, dated June 28, 1943, from H. V. Carter Company, was ever accepted by you?

A. It was definitely not, because at that time we

(Testimony of D. Ray Hall.)

couldn't accept orders with the uncertainties that existed.

Q. And I will direct your attention to your reply, which has already been called to the Court's attention, or your knowledge, rather. A. Yes.

Q. Mr. Hall, this appears to be dated July 1, 1943, and the last paragraph of this reply reads as follows:

"But at any rate, we would appreciate the order, and will hold it until such a time as we can see what we can do in the way of shipping. I am not at all sure that we could get that much equipment, but I would like [239] to offer for our discussion that both of us keep in mind of shipping you a full carload of tractors for possibly late this year. This would save us both considerable expense."

To what did you have reference when you said "ship a full carload later this year"?

A. What I had in mind at that time, to my recollection, is that at that time nobody knew as to what the conditions might prevail during the year. There might be possibilities of getting material, more than what we anticipated. We might be able to build more tractors.

Q. And what happened as an actual fact?

A. As an actual fact, the situation became increasingly difficult. It was increasingly difficult to operate throughout the war period, because materials became scarcer, and the restriction orders, the limitation orders, became better understood. It

(Testimony of D. Ray Hall.)

plainly showed that you would only manufacture a limited quantity for certain purposes.

Q. Well, did you actually produce more or less tractors? A. I beg your pardon?

Q. Did you actually produce more or less tractors thereafter?

A. Well, as far as the war years are concerned, we pretty well had an even keel. In other words, we were able to secure enough of rated orders with priority ratings to maintain our normal [240] production.

Q. So your production during the war years was just about the same, was it?

A. Our actual production was, but of course we was directed by the War Production Board on those types of orders. They had to be shipped specifically to where they originated.

Q. Now, Mr. Hall, I want to direct your attention to the order for 45 tractors, which was sent by the Carter Company to you and to the Gravely Pacific, in July of 1946. Did you ever accept that order? A. I did not. [241]

* * *

Q. (By Mr. Tenney): Now, Mr. Hall, I understood you on cross-examination by counsel to say—and correct me if I am wrong and misquoting you—that Mr. Graves and the Carter Company were in no different situation than anyone else, that they would have to beat the customers off during the war with a club, is that correct?

(Testimony of D. Ray Hall.)

A. That is absolutely correct. Conditions were like that throughout the world.

Q. And was Mr. Graves and the Carter Company in any different situation than other dealers throughout the country? A. None at all.

Q. And was the backlog of orders that Mr. Graves had any different than the backlog of orders held by dealers in other sections of the [243] country?

A. I would say it was different in that they were not nearly so large as they was in most sections of the country where we had active representation.

Mr. Tenney: That is all, Mr. Hall.

Further Redirect Examination

By Mr. Carroll:

Q. Mr. Hall, if you had fulfilled the orders which Mr. Graves had placed with you, there is no question in your mind that he would have sold every one of those, is there? A. Surely.

Q. What is your answer?

A. Surely, if he could have got them at that particular time, it would be very much questionable if he could fill them, if he got them, say, now, because those orders were dated back in the war years, and as I have mentioned, we would be very fortunate from our records and my recollection—it would be a deal very fortunate if he would be able to fill even 8 per cent of those orders after other material became available.

(Testimony of D. Ray Hall.)

Q. Have you not testified that the demand for Gravely tractors was just as great in '46 as it was previously? A. That's right.

Q. Was it not just as great in '47?

A. Possibly to a lesser degree, but to some degree.

Q. And you know perfectly, don't you, that if you had shipped the tractors which Mr. Graves ordered from you after the war, in [244] '46 or '47, which you would have been paid for in full the moment you shipped, there is no question but that he would have sold them, is that right?

A. That's right.

Q. That is true, is it not? A. That's right.

Q. And the profit which he would have made on those tractors was 30 per cent of the list price?

A. Yes, sir.

Q. And you have testified that it was your practice to demand payment in full for these tractors as soon as you loaded them on the freight cars?

A. That is our customary terms.

Q. So that you, yourself, would have had no worry about the payment for these tractors that Mr. Graves ordered from you?

A. That's true. In fact, any place we would have sent tractors, it would have been the same way.

Q. Now, then, you produced just as many tractors during the war as you did prior to the war, is that not right? A. Approximately so.

Q. As a matter of fact, you produced more during the war?

(Testimony of D. Ray Hall.)

A. I don't have the figures before me. From recollection, I would say approximately so.

Q. Well, didn't you produce more?

A. I don't recollect. [245]

Q. You can't tell his Honor whether you produced more or less during the war?

A. I can't recollect. I say we produced approximately the same as the previous war year.

Q. Now, then, about these Model D tractors, you are still including Model D tractors in all the price lists that you send out, are you not?

A. That is true.

Q. You included them in all your listings, you included Model D tractors, as late as 1946, after the war?

A. That's right, we were optimists. We hoped to have them.

Q. And as a matter of fact, in a letter which you identified for me this morning as coming from the secretary of your corporation in August of 1945, you said to Mr. Graves and the plaintiff in this action:

"We will do our very best on the tractors, especially the one you mentioned. However, as yet there is no definite promise as to when we will have them. We are expecting to manufacture considerable number of them yet this year and then we can furnish you with whatever is needed from that production."

You still repeat your testimony to the Court that you discontinued manufacturing these in 1942?

(Testimony of D. Ray Hall.)

A. That's right, that letter says we expect [246] to manufacture.

Q. And you still repeat your testimony to him?

A. That's right.

Q. Now as a matter of fact, the Model L tractors is an improved model, is it not?

A. It is a question of opinion. It is a newer model.

Q. Well, that is the reason you discontinued the D and manufacture the L, is that it is a better model; isn't that so? A. No, no, sir.

Q. It is a later and more efficient model?

A. I wouldn't say it is a later model; it is a later model, the L is. Not a more efficient model for the purpose.

Q. At all events, it is the model you are concentrating on?

A. No, not at present. The D tractor is being produced in England, and now we have been assured of supplies of those.

Q. Well, the L model is the model that you are concentrating on in this country?

A. That is on production.

Q. And it has been so in 1946 and '47 and also '45? A. It has been for some years.

Q. And any orders which you have for these tractors, you fill with an L if you can't get the D, don't you?

A. Not necessarily so. If it is an order for a D, where the D is adapted for it, the customer would not accept an L. The D is designed for a different purpose than the L.

(Testimony of D. Ray Hall.)

Q. Did you finish? [247] A. Yes.

Q. Is it not true that you customarily and regularly fill orders for D tractors which were taken during the war with the L tractors now?

A. No.

Q. Is it not true that particularly in California, the L tractor is acceptable in the place of the D tractor for any type of work?

A. It is not true at all. There is conditions in California definitely—in fact California is our biggest state for the sale of the D model tractor.

Q. Now, then, in this letter which your attorney has read to you in regard to the 25 Model D tractors, and your response to it, you did not tell Mr. Carter you would not accept his order, did you, the Carter Company?

A. The intention of that letter was the fact that we couldn't accept the order from Mr. Graves or the Carter Company.

Q. Will you point out to me any place in this letter where you say, "we won't accept this order"?

(Handing to witness.)

A. That exact language, no.

Q. Will you point out any place in it——

A. "I am not at all sure we could get that equipment. At any rate, we appreciate the order and will hold until such time as we can see what we can do in the way of shipment."

I didn't say that—— [248]

(Testimony of D. Ray Hall.)

Q. Just a moment. You didn't say in that letter that you had rejected the order, did you?

The Court: What exhibit is that, Mr. Carroll?

Mr. Carroll: I am sorry, your Honor, this is Exhibit No. F-F.

Q. As a matter of fact, instead of rejecting this order, saying you didn't accept it, didn't you say to the plaintiff in this action that your first thought on looking at his order was that he should have an equal number of L tractors, an equal of D tractors?

A. That is mentioned in the letter.

Q. That is what you said to him, wasn't it?

A. That's right.

Q. And didn't you also say to him, instead of saying that you wouldn't ship on the order, didn't you say to him, "But I would like to offer for your suggestion that both of us keep in mind of shipping you a full carload of tractors for possibly late this year," and that is in 1943?

A. That is said in the letter with the hope that more tractors would be available.

Q. That is what you said to him about this order, isn't it?

A. That's right.

Q. And that is what you call not accepting the order?

A. That's right, the order was not accepted.

Q. Now you said something about not accepting the order that [249] was given to you in 1946 for 45 tractors. You said something about the restrictions. As a matter of fact, the restrictions that had applied

(Testimony of D. Ray Hall.)

during the war were largely lifted before that order was placed with you, is that not true?

A. That's right, that is true.

Q. Now will you please tell his Honor whether, on receipt of either one of these orders, you ever wrote to the plaintiff in this case that you would not fill them? A. I do not recollect.

Q. Will you tell the Court, please, whether you ever wrote to the plaintiff and who submitted these orders to you in which you received and acknowledged—did you ever write that you would reject the orders? A. I don't recollect.

Q. As a matter of fact, you have no single, solitary letter as any of these orders that ever informed the plaintiff in this case, whom you were urging to solicit orders, that you would not deliver these orders?

A. I don't recollect any particular letter to that effect; our bulletins covered those particular subjects.

Q. Despite that, you had a rather extensive and voluminous correspondence all during this time with the plaintiff company?

A. I wouldn't say that; we had correspondence.

Q. You had correspondence with him during all during this period, did you not? [250]

A. We had correspondence with the plaintiff.

* * *

JOHN W. HEINEN

recalled on behalf of the plaintiff; previously sworn.

The Clerk: The witness on the stand is John W. Heinen, previously sworn.

Direct Examination

By Mr. Carroll:

Q. Mr. Heinen, you sell tractors direct [251] to the ultimate consumer, do you not?

A. That is true.

Q. And you have been doing that through '45, '46, and '47? A. Right.

Q. And your company, which is in turn owned by the defendant Gravely Motor Plow & Tractor Company, receives the 30 per cent list price on the products—the discount? A. Which company?

Q. Your company.

A. We receive a discount, yes.

Q. Then you received the discount which would have gone to Mr. Graves' company; for instance, if you had sent the tractors to him? A. Yes, sir.

Q. That is true, is it not? A. Yes.

Q. Now will you tell us, please, how many tractors you distributed, your company, in California, in 1945?

A. I think I have those figures here. Forty.

Q. And how many did your company distribute or sell in 1946? A. 164.

Q. 164. That is in the State of California.

A. Not only in the State of California.

Q. Well, how many did you?

(Testimony of John W. Heinen.)

A. But in the five adjacent states also. [252]

Q. How many did you distribute in the State of California in 1946?

A. That is a difficult thing to say, without referring to our sales record.

Q. Have you your sales record with you?

A. No.

Q. Where did you get the memorandum you are refreshing your recollection with?

A. These are figures that were procured from the Gravely Motor Plow & Cultivator Company's books. Mr. Hall supplied me with these figures. They took them off their records.

Q. In other words, the figures you are now testifying from are the figures Mr. Hall gave you which he in turn got from the secretary of the defendant Gravely Motor Plow & Cultivator Company in West Virginia?

A. I presume so.

Q. And how many did you distribute in 1947?

A. 267.

Q. 267. And on each of those that you distributed yourself, directly, to the customer, you received the 30 per cent discount from the list price?

A. We received a discount, yes. A little different than that, but we received a discount.

Q. As a matter of fact, you got a 40 per cent discount, didn't you? [253]

A. That's right.

Q. You get 10 per cent more than Mr. Graves' company would have gotten had you sent these tractors to him for distribution on his unfilled orders?

(Testimony of John W. Heinen.)

A. As a distributor, we are allowed 40 per [254] cent.

* * *

Q. And in regard to every one of the tractors that you sold, instead of sending them out on the orders of the plaintiff in this case to the plaintiff, on every one of those orders your company made a 40 per cent discount? A. That's correct.

Q. Which otherwise would have been made by the plaintiff in this case?

A. Correct. The plaintiff wouldn't have made 40 per cent, but only——

Q. The plaintiff would have made only 30 per cent?

A. That's right; 10 per cent override for us.

Q. In other words, instead of getting 10 per cent override on which you might have sent to the plaintiff in this case, you got 40 per cent by filling the order yourself?

A. Correct. Any orders fulfilled or filled from our office, we get 40 per cent.

Mr. Carroll: That is all, Mr. Heinen. [261]

* * *

Cross-Examination

By Mr. Tenney:

Q. Now as a matter of fact, Mr. Heinen, have you examined your records to see how many orders were filled by you after August 23, 1946, which were duplications of the orders which were submitted to you by the Carter Company prior to August 23, 1946?

(Testimony of John W. Heinen.)

A. Yes, our records indicate there were two—one of which Mr. Graves himself requested us to fill. It was a Veterans Administration order, and Mr. Graves happened to have it on file, and he asked us if we wouldn't make a special effort to fill this order, and that he, Mr. Graves, of course, expected no commission. This all took place, naturally, after our relations were severed with Mr. Graves.

Q. And what was the other?

A. The other, I remember very clearly, is a Mr. Graff, up [262] in this territory, who had an order on file and sent us a letter; if I recall clearly, I believe that was the situation. This letter begged us for a tractor, which we build. I understand that that was one of Mr. Carter's or Mr. Graves' old [263] orders.

* * *

Mr. Tenney: If your Honor please, I might read the correspondence in connection with this matter. It commences with a letter of January 10, 1947, and the last documents is a letter from H. V. Carter Company, addressed to Gravelly Motor Plow & Cultivator Company:

“Gentlemen:—”

Mr. Carroll: Just a moment. You don't mean the correspondence commences with this letter?

Mr. Tenney: I said the exhibit commences with the last letter.

Mr. Carroll: I thought you stated—

Mr. Tenney: (Reading)

“On April 30, 1945, we placed our order No.

(Testimony of John W. Heinen.)

27842 with you for a Gravely Model L tractor with tool holder complete, rotary plow and cycle bar attachment for Mr. V. Graff, 627 Eighteenth Avenue, San Francisco, California, this to be shipped to us for delivery by us to Mr. Graff.

“Yesterday, this gentleman called in and stated he had received the tractor from you in response to his letter to you. He wanted instructions as to setting up and operating the equipment, in which we gave him the necessary service.

“Now comes the question as to our commission for this [265] sale, as Mr. Graff states he has paid you in full for it.

“Very truly yours,

H. V. CARTER COMPANY,
INC.

By D. E. GRAVES.”

Q. Now did you pay H. V. Carter Company any commission on this transaction? A. No.

Q. Did you request them to set up the equipment, or give the instructions in connection with the setting up of the tractor? A. No.

Q. Now is it your best recollection that the two transactions that you have testified to are the only ones that your records disclose of orders obtained by H. V. Carter Company that were filled after August 23, 1946? A. Yes.

Mr. Tenney: That is all.

(Testimony of John W. Heinen.)

Redirect Examination

By Mr. Carroll:

Q. Did you ever answer Mr. Carter's or Mr. Graves' letter?

A. Not that I can recollect.

Q. Well, why didn't you?

A. I don't believe I did. I can't recollect of ever having.

The Court: I can't hear your answer.

The Witness: I can't recollect of ever [266] having answered it.

Q. (By Mr. Carroll): Where did this correspondence come from?

A. What portion of the correspondence there?

Q. Well, where did any or all of it come from?

A. Well, part of that, I think, came to us from the factory. In fact, that is about the only way that we would have gotten any notification.

Q. Well, can you look at these papers and tell me when you first got them? (Handing to witness.)

A. Yes, I certainly can.

Q. Or maybe I can shorten it up. Did you get them just before this trial?

A. If you don't mind, I will answer that in just a moment. I can tell you in a moment. (Examining file.) Yes, we received this from the secretary of the Gravely Motor Plow & Cultivator Company on October 4, 1946.

Q. All of this correspondence?

(Testimony of John W. Heinen.)

A. The fact that there was an order to be filled for Mr. Graff.

Q. When did you receive the rest of the correspondence that your attorney has put in evidence? There are some original letters there to you, or copies of them there.

A. January 15, 1947, from the secretary of the Gravely Motor Plow & Cultivator Company.

Q. Well, let me ask you this: When did you first see this batch of correspondence before you testified here this [267] afternoon, in its present form? You have seen this before you testified, have you not?

A. This is from a file that we have.

Q. Well, did you assemble this?

A. That is what I am trying to get at. No, no.

Q. Who did assemble it?

A. Well, I presume that this order, the original order here, came from Dunbar. That is a Dunbar stamp.

Q. Well, where did you get it?

A. We have never received it.

Q. Where did you get it from?

A. I have just received it now.

Q. Have you seen it before?

A. I have seen a portion of this before.

Q. You mean you have never seen this batch of correspondence together before you testified here to this Court? A. I don't believe I have.

Q. You didn't see it before you took the stand this afternoon? A. In this form, no.

Q. Now you say you got this order from the fac-

(Testimony of John W. Heinen.)

tory on October 4, 1946? A. That's correct.

Q. Is that correct?

A. Yes. Is that the letter from the secretary?

Q. Yes. [268] A. To us? To me?

Q. Yes. A. That's right.

Q. And here is what the secretary—that is, Mr. Thomas—the secretary of the Gravely Motor Plow & Cultivator Company said to you: (reading)

“Dear Mr. Heinen:

“Here is a letter which we received today from one of Carter's customers. I know that you will want to *take of* this for him.

Yours sincerely,”

Q. You never wrote to Mr. Carter about this?

A. Are you asking me a question, sir?

Q. There was a question mark at the end of that. At least, there was meant to be.

A. From our file, apparently not.

Q. You went ahead and filled it without any reference to him at all whatsoever, did you not?

A. There was no necessity of referring it to him. It was long after this contract was voided that we made any effort.

Q. Pardon?

A. To fulfill that, to fulfill that order.

Q. And even though the plaintiff in this action, at the request of the customer who bought this from you, serviced this tractor and gave him instructions on how to operate it, and wrote to [269] you about the commission or wrote to the Gravely Motor Plow

(Testimony of John W. Heinen.)

& Cultivator Company, you never even bothered to answer the letter?

A. Who serviced the tractor?

Q. The plaintiff in this action.

A. Well, I am sorry to disagree with you there.

Q. Well, here is a letter addressed to the Gravely Motor Plow & Cultivator Company dated January 10, signed by Mr. Graves. This letter was in turn referred out to you by your principal, Mr. Hall, was it not?

A. That is something I can't tell, correspondence.

Q. Well, it was referred out to you by Mr. Thomas, the secretary of the Gravely Company?

A. That's correct, I would say.

Q. All right, now, here is a letter from Mr. Carter which you apparently didn't hear while your attorney read it:(reading)

"Gentlemen:

"On April 30, 1945, we placed our order No. 27842——"

This is the letter from Mr. Graves, now.

A. Yes.

Q. (continuing)

"——with you for a Gravely Model L tractor with tool holder complete, rotary plow and cycle bar attachment for Mr. V. Graff, 627 Eighteenth Avenue, San Francisco, [270] California, this to be shipped to us for delivery by us to Mr. Graff.

"Yesterday, this gentleman called in and

(Testimony of John W. Heinen.)

stated he had received the tractor from you in response to his letter to you. He wanted instructions as to setting up and operating the equipment, in which we gave him the necessary service.

“Now comes the question as to our commission for this sale, as Mr. Graff states he has paid you in full for it.”

Now you never even bothered to answer that letter, did you?

A. There was no necessity of answering a letter of that type, inasmuch as the Carter Company had nothing whatsoever to do with the filling of that order. We filled that order.

Q. It was Mr. Graves' order, was it not?

A. No, it was not at the time we filled it, it was our order.

Q. Isn't that order Mr. Graves' order (indicating)?

A. In 1945?

Q. Is that not Mr. Graves' order?

A. That he made the sale.

Q. You knew it was Mr. Carter's order when you got this from the Gravely Motor Plow & Cultivator Company?

A. Why certainly.

Q. They told you that? [271]

A. That's right. [272]

* * *

Mr. Carroll: That is our case, your Honor; the plaintiff rests.

The Court: We will take a recess now for about ten minutes.

(Short recess.)

The Court: The court will come to order.

Mr. Tenney: At this time, if the Court please, we would like to move the Court under Rule 41b for a dismissal of this action on the grounds stated in 41b. I do not know whether your Honor desires to hear argument on the motion.

The Court: Why under 41b? It is under 41b, is it?

Mr. Tenney: Yes, sir.

The Court: I will deny it without prejudice, and upon the consideration of the entire case, reconsider it.

Mr. Tenney: Very well, your Honor; thank you.

We will call Mr. Hall as the first witness, and at this time may I ask your Honor's permission that my associate, Mr. Clifford, examine Mr. Hall in connection with the motion we made at the start of the trial?

The Court: Yes, sir.

Mr. Tenney: To quash service of summons?

The Court: Yes, sir.

You have no objection to that, Mr. Carroll, have you?

Mr. Carroll: None at all, your Honor. [284]

D. RAY HALL

recalled on behalf of defendants; previously sworn.

Direct Examination

By Mr. Clifford:

Q. Mr. Hall, what is your position with the Gravely Motor Plow & Cultivator Company?

A. I am president of that organization.

Q. And how long have you been president of that organization?

A. I have been president since 1936.

Q. And what is your position with the Gravely Pacific Company?

A. I am also president of that corporation as well.

Q. And how long have you been president of that corporation?

A. Since its inception in 1944.

Q. And are you familiar with the internal workings of both organizations? A. Yes.

Q. Who is the auditor for the Gravely Motor Plow & Cultivator Company?

A. Our auditor for the Gravely Motor Plow & Cultivator Company is Mr. R. C. P. Waicher, a C.P.A. of Charleston, West Virginia.

Q. And where do you keep your books and accounts and reports of the cultivator corporation?

A. In Dunbar, West Virginia.

Q. And where is your office for that corporation?

A. In Dunbar, West Virginia.

Q. And where is the office of the Gravely Pacific, Incorporated? [285]

(Testimony of D. Ray Hall.)

A. It is in California, in Los Angeles, California.

Q. And is the Gravely Motor Plow & Cultivator Company qualified to do business in the State of California?

A. It is not, nor has ever been.

Q. Is the Gravely Pacific, Incorporated, qualified to do business?

A. In the State of California, it is.

Q. Is there an agent for service of process designated for the Gravely Pacific, Incorporated, in the State of California?

A. There is. I am not sure whether it is the secretary of the state or the auditor that we have, but one *of* the other. I mean the independent C.P.A. auditor.

Q. And where are the books and records of account of the Gravely Pacific, Incorporated, kept?

A. They are kept in Los Angeles.

Q. And who is the auditor for Gravely Pacific, Incorporated?

A. A Mr. George Brun. I believe it is in Pasadena, his home address.

Q. And who is the managing director of the Gravely Pacific, Incorporated?

A. Well, I had better answer that question and explain. While all of the affiliated corporations with the Gravely Motor Plow & Cultivator Company have caused to be formed, that the plan of action on that was to—they are West Virginia corporations; that is, incorporated in West Virginia, and then qualified to [286] do business in the particular

(Testimony of D. Ray Hall.)

section of the country in which they located. And that to supervise those activities, Mr. Edward Heiner—he maintains an office in South Charleston, West Virginia, and his duties is to supervise all of those corporations as managing director, is the title we give him.

Q. And orders for the service and sales policy of the different corporations are issued out of his office?

A. That's right, they are formulated by the directors' meetings that we have, in which, in turn, he attends of course, and then our policies are formulated in that manner, and he transmits them to the organizations out in the field.

Q. Why were these twenty-one corporations formed?

A. Well, our purpose in forming those was in no way at all to interfere with our normal way of selling, except to this point: We found that individual distributors—when I say "distributors," they are the ones that get a much higher discount, they have 40 per cent as at present, and the dealer outlet, as we call it, is 30 per cent. Now they were formed primarily with the very thought in mind of attempting to decentralize each area of the United States, and so that in turn, that the affairs of that company, as it has to do with selling and servicing of our product, could be better taken care of. We also found that the policy of individual distributors establishing branches, branch offices, or anything of that sort, were not as adaptable as this particular

(Testimony of D. Ray Hall.)

type of plan, because if [287] another distributor sells your line, we have no control as to whether he might sell competitive lines, or whether he might discontinue selling the line completely. Whereas a corporation, it goes on. In other words, a manager of a corporation may change, but that corporation has their facilities, trucks, service facilities and whatnot, so that they perpetuate themselves. It is a very good business reason for that.

Q. When the Gravely Pacific was organized, did it cause the removal of its previous distributor outlets in California?

A. As far as distributor outlets, it naturally replaced the distributor outlets, but that particular time in California, that the main thing there, that is, and as our bulletins pointed out, the formulation of these companies did in no way have anything to with the dealers. The dealers couldn't—they continued as they had in the past, but their relations then were made directly with this corporation.

Q. Was it formed with the intention of removing any dealers in California?

A. Not at all, because our policy is still to sell and to sell through dealer outlets, because we find that our product is one that must not only be sold, but must be serviced, too, and that is the purpose of this corporation, is in no way or sense of the word to secure an undue amount of profit. In the first place, this distributing agency that replaced or replaces individuals, in most cases, on distributing,

(Testimony of D. Ray Hall.)

it didn't replace [288] dealers, nor did not affect their sales in any way.

Q. And at the present time, you not only have Gravely Pacific as a distributor, but you also have dealers located in the State of California?

A. That is true, and the policy of the Gravely Pacific is to continue to expand those facilities for selling through dealers. As a good illustration, we never were able to secure the right type of dealer representation in northern California. Now by the fact that the Gravely Pacific is a separate organization there and is able to keep in closer touch with this territory, they have been able to establish a dealer now that is perfectly satisfactory—is performing in a much more satisfactorily manner. He is able to carry out things that we have found over twenty-six years of experience is very vital to the success of selling and distributing our product.

Q. Were the other dealers, the dealers that you mentioned prior to the inception of the Gravely Pacific, required to perform sales and repair services? A. Yes.

Q. At that time? A. Yes.

Q. Are the activities of the dealers in California substantially the same now at this time as they were prior to the inception of the Gravely Pacific? [289]

A. They are; their functions are identical.

Q. And has it been the policy of Gravely Pacific to pay commissions on sales made in the territories of the dealers since the inception of Gravely Pacific?

(Testimony of D. Ray Hall.)

A. If those are dealers—I mean, if that is in a territory where they have an active dealer that is working, certainly they would pay commissions to that dealer on anything that they might in turn deliver in that territory.

Q. Coming back to the internal operations of both corporations, how does your plan—well, for example, when you receive an inquiry, when you personally receive an inquiry as president of both corporations, receive an inquiry directly from the field from some dealer in California, do you respond to that letter, that inquiry?

A. If we receive a matter pertaining to—and I am not referring to just the normal course of a retail inquiry or a correspondence in for folders, but I am talking about anything that happens in that territory where it is a matter for Gravely Pacific to decide—it naturally is a matter that is referred to our office in Los Angeles, the office of the Gravely Pacific, for them to direct their correspondence from there.

Q. Well, if you were to respond to a direct reply, on what stationery would you answer that letter?

A. That would be—a lot would depend on the nature of the reply. But, for instance, in a dealer, like the H. V. Carter [290] Company, that we had known for years and which they have customarily wrote us often, out of politeness I would naturally reply to that on Gravely Motor Plow & Cultivator letterhead. That would be my normal procedure,

(Testimony of D. Ray Hall.)

instead of just referring it directly to the corporation in Los Angeles.

Q. Are you familiar with the preparation of the income tax returns for the various corporations?

A. That is true, that I am, because I might explain it in this way: That in the formation of these corporations, there was a decided question there as to whether, if there was a close enough tieup on these corporations, their income tax returns would have to be consolidated with the Gravely Company. That matter has come up and not too far back, and has been decided through the Collector of Internal Revenue at Huntington, West Virginia, that there was a legitimate business purpose, and these were separate corporations, and they allowed them to make their tax returns separately, and instead of with the Gravely Motor Plow & Cultivator Company, although, Gravely Company does own the majority of stock in each corporation.

Q. You have stated that the Gravely Pacific was organized in 1944?

A. That's right.

Q. That was the time when the excess profits tax was still in effect?

A. That's right. They went in effect in the year 1945, as well, [291] which would make the question of even greater vital importance for those years, and our income tax was returned separately, which is a further indication that they are entirely separate corporations as far as their legitimate offices are concerned. [292]

(Testimony of D. Ray Hall.)

Q. (By Mr. Tenney): Mr. Hall, you have already testified with respect to the order received from Mr. Graves of the Carter Company for the 45 tractors in July of 1946? A. That's right.

Q. And you have testified that that order was not accepted by you? A. That's right.

Q. And by "you" I mean the factory; did you ever acknowledge that order to the Carter Company?

A. I am not sure—to my knowledge, that is.

Q. Mr. Hall, I will ask you, was Gravely Motor Plow & Cultivator Company, at the time of the receipt of that order, in a position to fill it?

A. No.

Q. Why?

A. Due to the fact that there is still scarcity of material. Our production capacity was not so large. Now I might also explain that further by saying that——

Mr. Carroll: Just a moment, your Honor; I think the witness has answered the question.

The Court: Well, he can explain it if he wants to.

A. (Continuing): That in 1946, the first part of the year, particularly the three-quarters of the early part of the year, they were extremely difficult in securing material and [294] manufacturing. Our much heavier sales were not in effect until the very latter part of 1946, and any increase in sales shown in 1946 over '45 was in the latter part.

Q. And directing your attention again, Mr. Hall,

(Testimony of D. Ray Hall.)

to the order of 1943 for the 30 tractors, 25 of which were D tractors, you testified that that order was not accepted by the factory? A. That's right.

Q. And were you in a position at the time of the receipt of that order to fill it?

A. Definitely not.

Q. Were you ever in a position up to the present time to fill that order with respect to the D tractor?

A. That's right, we are not.

Q. Up to the present time?

A. That's right.

Q. And those two orders you have already told his Honor were lump orders?

A. That's right.

Q. You never received any specific names for any customers or purchasers of Carter Company with respect to any of the tractors included in those orders, is that correct? A. That is right.

Q. And as to the remaining 47 orders, 4 of those, Mr. Hall, I believe you testified were also D tractors? A. That's right. [295]

Q. You received those orders—when you received those orders—were you in a position to deliver them? A. No, we were not.

Q. Are you in a position now to deliver them?

A. No.

Q. Have you been since the time of the receipt of the orders, in a position to deliver them?

A. We have not.

Q. And that brings us down to 43 orders, Mr.

(Testimony of D. Ray Hall.)

Hall, and those orders, as shown by the bill of particulars in this case, were for L tractors?

A. Yes, sir.

Q. Did you ever accept any of those orders?

A. We did not.

Q. And at the time of the receipt of those orders, were you in a position to fill them?

A. We were not.

Q. Now, Mr. Hall, there has been some mention made of a visit that Mr. Graves made back to the factory, I believe, in October of 1945?

A. Yes, I recall.

Q. Is your recollection correct, that that was the time that Mr. Graves came back there?

A. Yes, that's right.

Q. Did you see him at that time? [296]

A. Yes, I did.

Q. And will you state to his Honor, please, first, when did this conversation take place, to the best of your recollection, and who was present?

A. As I recollect, it was in October of 1945. I would not remember the exact date, and as far as other people being present, Mr. Graves—I wouldn't recall anybody else being present excepting Kenneth Thomas, the secretary of our company. We have an adjoining office, and we probably was together part of the time on that.

Q. But you had a meeting at that time, anyway—you personally? A. That's right.

Q. With Mr. Graves? A. That's right.

Q. Will you please state to the Court, Mr. Hall,

(Testimony of D. Ray Hall.)

your best recollection as to the substance of what the conversation was that took place between you and Mr. Graves at the time he was back there?

A. In the first place, this had been worked up to by correspondence. Mr. Graves was wanting to come to the factory with the idea in mind of discussing with us the possibilities of continuing to selling Gravelly tractors. At that time, as we had intimated, the fact that on the contract we had had previously, in the years 1940 to 1942, there was certain things we required. [297]

Mr. Carroll: If your Honor please, I would just like to interrupt the witness at this point. I dislike interrupting, but I gather the witness had said something about something he had intimated previously.

The Court: I think the question calls for the substance of the conversation.

Mr. Tenney: That is correct, your Honor.

The Witness: I will answer it differently, pardon me.

A. (Continuing): The substance of the conversation was the fact that Mr. Graves now wanted, through the Carter Company, to sell many more—that is, to sell our tractors—and to receive our tractors from him. My reply to that was a restatement of the fact as to what had transpired in these previous years, and the fact that he had always sold competing lines and hadn't given our, the type of representation that our tractor merited. That I also mentioned, and I also mentioned the fact that we

(Testimony of D. Ray Hall.)

often had letters from users saying that Mr. Graves had tried to sell different machines.

Q. (By Mr. Tenney): Is this the correspondence that took place between you?

A. That's right, as I recollect it, and it was due to a number of factors like that that we were—that we did not encourage Mr. Graves that we would allow him to continue to sell. Mr. Graves wanted to know what he could do to secure, to continue with the agency, and at that time I cited to him the fact that [298] the main thing that we required would be that he provide a suitable manpower, so that our product would be given the proper type of demonstration work, and that he also be cooperative in the new distributing point that we were planning to establish, or that we had established in California. And the third thing I have mentioned was the fact that in order to do this, that he should provide facilities so that our product would not be confined entirely with competing lines, and that was the basis that we operated, as far as our other dealers are concerned. That was the gist of the conversation, as far as Mr. Graves was concerned, as far as the fact mentioned. Mr. Graves mentioned, "Well, if I do this and provide a building, how many tractors, or what tractors will I receive?" He was not promised one single solitary thing. I think his testimony on that is very accurate as to what I told him, that he would not—we could not guarantee one single solitary tractor, because our policy—my policy—as I explained to him, over the uncertain

(Testimony of D. Ray Hall.)

years, we never have, we haven't any delivery promises to any dealer. We don't make delivery promises as to things that are too uncertain—have been for those——

Q. (By Mr. Tenney): Were the orders that Mr. Graves had at that time, and by that I mean the orders where you had received the names of the prospective purchasers, were those discussed? [299]

A. They were discussed—if they were discussed, they were discussed in the light of the fact that he would like to receive tractors in order to fill those particular orders, and I mentioned with no intention as to any segregation, that he would need new orders in order to justify the expense of the business. Mr. Graves knew he would not get any tractors at all unless some suitable facilities were supplied to service our product.

Mr. Carroll: I ask that that be stricken out as the opinion and conclusion of the witness as to another man's state of mind.

The Court: That part may go out.

Mr. Tenney: Very well, your Honor.

Q. (By Mr. Tenney): Did you tell Mr. Graves anything with respect to when, if at all, there would be delivery on the orders that I have just referred to?

A. No, Mr. Graves was informed at that time of the fact that it was—I am absolutely uncertain as to when any delivery promises were made, any delivery could be made. In fact, well, as I explained

(Testimony of D. Ray Hall.)

to Mr. Graves at that time, and as subsequent bulletins brings out, the tractors that we could build them, they would be allocated to the dealers that would give us the proper type of representation, and that he had not in the past ever did that.

Q. Did you or did you not have any discussion with Mr. Graves [300] at that time with respect to screening orders and getting deposits?

A. Yes, definitely we do.

Q. Will you state to his Honor what that was, giving the conversation as best you can recall it?

A. The best as I recall it, was the fact that as we pointed out, and as we pointed out to all our dealers, that I might be talking to, the very fact that it is so easy during those periods of inflation and war to secure so many orders that would be duplicated with any number of other people that would handle different competing machines. We did not consider those orders of any value at all until it developed that they would really take delivery when they would be available, because with our production as it is, on small tractors, we knew, and as I informed him at that time, that would be absolutely impossible for us to produce the number of tractors that the dealers intimated that they had on order and wanted. [301]

* * *

(Testimony of D. Ray Hall.)

Cross-Examination

By Mr. Carroll:

Q. Now you have testified about your ability to fill these orders. Tell the Court, if you will, please, how much your production in '46 increased over your '45 production. A. I don't recall.

The Court: The record is here.

Q. Well, what is your best recollection?

A. The year '46 or '45?

Q. Yes.

A. As I explained before, the increase was all in the latter part of the year, the greater part of it. I would estimate possibly 25 per cent or something like that. [304]

Q. Twenty-five per cent increase in '46 over '45?

A. That's right.

Q. What was the percentage increase in '47 over '45? A. I wouldn't recollect.

Q. As a matter of fact, weren't your sales in 1945 about \$973,000? A. I don't recollect.

Q. What is your best recollection?

A. I wouldn't attempt to recollect on the thing, or maybe you would put the figures up to me and next, say I am wrong. I wouldn't attempt to estimate.

Q. Weren't your sales in 1946, as against the 1945 figure of \$973,000, weren't your sales in '46, \$1,775,000?

A. I don't recollect the exact figures of our sales. I will say this, that our sales have increased, natu-

(Testimony of D. Ray Hall.)

rally—'46 over '45, '47 over '46, and '48 over '47.

Q. And can you give his Honor an estimate of the increase of your sales of '47 over '45?

A. I wouldn't attempt to; it would be confusing. We have made some increase of sales.

Q. Let me ask you if these figures are not approximately correct, that your sales in 1945 were \$973,000 and that your sales in 1947 were \$3,790,000?

A. I don't remember as to the exact division on those.

Q. Well, was it two or three million last [305] year?

A. Our sales of last year, of 1947?

Q. Yes.

A. My recollection would be again—I hesitate to make an estimate—you are so easily confused. Our sales in 1947, my estimate would be two million and a half.

Q. You mean it was not three million?

A. I don't remember—somewhere between two million and a half and three million would be closer to the figure.

Q. Might it have been three and a half million?

A. It might have been anything. I am just giving you my estimate.

Q. The Dun & Bradstreet, though, shows \$3,790,000. Is that \$3,790,000, would that be correct?

A. How many?

Q. Would that be \$3,790,000?

A. You can draw your own conclusion, I think. I would assume possibly it would be.

(Testimony of D. Ray Hall.)

Q. That is approximately correct, isn't it?

A. Yes.

Q. And that is against sales in 1945, of \$973,000?

A. The figure of \$973,000 sounds quite wrong. I think our sales were much higher than that, that year.

Q. If the Dun & Bradstreet report shows that, do you think that was an approximate figure?

A. I don't think that is right, because we haven't filed our [306] reports with Dun & Bradstreet on all years.

Q. With your—strike that. Were your sales approximately a million dollars in '45?

A. My estimate would be that it would be higher than a million dollars.

Q. How much higher?

A. This is purely an estimate; I would say somewhere around a million and a half to two million.

Q. So that the difference, you think, is between a million, or a million and a half, to three million seven hundred and ninety thousand in '46?

A. That's right.

Q. Now at all events, Mr. Hall, you were in a position in 1946 and '47, and '48, to send 474 tractors to your subsidiary here and to Mr. Seavey, correct?

A. We was in a position. You are reciting the figures that were sent. That answers itself. Yes, we sent those.

Q. As a matter of fact, you sent more than that;

(Testimony of D. Ray Hall.)

those are only the figures that they have sold here themselves. Do you know how many tractors you sent out here to Gravely in 1948?

A. You mean the Gravely Pacific?

Q. Yes.

A. I do not know. I have no figures with me on that figure.

Q. Mr. Heinen repeated some figures that he got from the data [307] you gave him. Don't you have the data, too?

Mr. Tenney: I had this data this morning. This is yours.

A. Is that mine? I think—I don't think that has the '48 sales. This doesn't have the '48 sales on it; this is only for '45, '46, and '47.

Q. Have you got it some place else? Mr. Heinen said he got it from you.

A. No, you asked Mr. Heinen for the other dates. On the '48 sales, we don't have that. But the principal thing, if I may comment further, that there is no depending on the fact that our sales have increased each of those years, and also, I want to also make a comment on that same question, that as we have explained and explained to Mr. Graves when he was there, the allocation of these sales is going to be an allotment, and was going to the dealers who would furnish us, or give us, the right type of representation.

Q. Well, Mr. Heinen has testified on the basis of the figures you gave him, that you sent him 164 tractors in 1946, that you sent him 267 tractors in

(Testimony of D. Ray Hall.)

'47. Did you send him at least an equal number in 1948?

A. I would say we probably did. It would be my estimate that we did. I would like to also qualify that statement and make this assertion, that on the sales that we made, and to that, the Gravely Pacific in this territory, that they were made to [308] dealers with the same discount, who was receiving identically the same discount as the H. V. Carter Company, and with all of them. And if the H. V. Carter Company would give us the right type of representation, why in the world would we want to receive another dealer, or deviate from the Carter Company and give them the reasonable opportunity to do what we gave the Carter Company a reasonable chance to do?

Q. Have you finished now? A. Yes.

Q. Now to get back to these figures, you sent 164 out here in '46, you sent 267 in '47, and you say you sent at least an equal number in 1948, to the Gravely Pacific, correct?

A. 1948 is not over, by any means, yet, but I would say we sent at approximately the same ratio.

Q. Well, assuming you have sent approximately the same—and this is the end of November and you are sending more now, aren't you, than you sent them in '47?

A. I wouldn't say that from memory. I will say we sent them approximately the same, because——

Q. Well, assuming——

(Testimony of D. Ray Hall.)

A. May I continue and complete my statement there, please?

Q. Yes.

A. The same, for this very reason, that—and which has a bearing on the case; these orders that we speak of as taken back in these other times, tractors were in much, much, much [309] greater demand than they are today. These orders that we have, as I pointed out, it was only a small——

The Court: Are you smoking in the court room?
(To spectator.)

Mr. Carroll: May the witness continue, your Honor?

The Court: Yes.

A. (Continuing): I have forgotten what I was saying. I am through.

Q. (By Mr. Carroll): Well, now, if you will permit me for just one moment, Mr. Hall, assuming—give or take—a few either way, that you sent approximately the same number in this year that you sent in '47, that means that in '46, '47, and '48, you have sent Gravely Pacific 728 tractors, correct?

A. That's correct. [310]

* * *

Q. (By Mr. Carroll): What I am saying to you is this: You have sent tractors to Mr. Seavey, who didn't start with you here before February of 1947, all of Mr. Graves' orders, and the orders of the plaintiff in this case—they had been all placed with you prior to July of 1946, is that not true?

A. That is true.

(Testimony of D. Ray Hall.)

Q. And is it not true that—When did the Gravely Company commence to operate in California?

A. The Gravely Company as a corporation has never operated in [312] California.

Mr. Tenney: Which Gravely?

Q. (By Mr. Carroll): When did the Gravely Pacific Company, your subsidiary, commence to operate? A. In 1944, the end of 1944.

Q. And did they open up—when did they open up their office? A. In 1944—or '45.

Q. What month? A. I wouldn't recall.

Q. Is it not true that the great bulk of the orders that you took and received from the plaintiff in this case were in your hands before Gravely ever started to operate? A. That is true.

Q. But you have been able to supply them, though? A. That is not true.

Q. You have supplied them; you don't deny that, do you?

A. They have more orders than they could fill. In this period, I mean as far as '46 was concerned, and '45, they were just in the same position, exactly, as you mentioned. They had more orders than they could fill, or think of filling, taking them.

Q. And you don't deny that you had sent them tractors for delivery which they themselves had personally sold since they started business in 1945 in that amount approximating between three and four hundred? A. Surely. [313]

Q. Orders taken subsequent to the taking of the

(Testimony of D. Ray Hall.)

great bulk of the orders which you received from the plaintiff in this case? You don't deny that?

A. I deny the fact as far as the orders—you refer to them as orders, and as to the conditions existing in '47 and '48, I deny that there was any of those orders as of today.

Q. You never once sent a notice of cancellation of any of the orders you received from the plaintiff in this case? A. I don't recall.

Q. You never told them, or sent them a letter, saying that you wouldn't fill them?

A. I don't recall; it would only be natural not to recall those things. We certainly wouldn't discourage a man not to wait until he could get our product.

Q. Now isn't the real reason you are not honoring any of these orders, isn't that that you think you have found a better dealer?

A. The real reason we are not honoring those orders is the fact that the dealer that we attempted, and gave the chance and opportunity to do what we thought he should, completely and miserably failed to do that.

Q. Then that is the reason you are not honoring the orders, isn't it?

A. The orders from the Carter Company?

Q. Yes. [314] A. That is true.

Q. You allowed him to proceed all through the war, to take orders, you received the orders, and you kept him on during the war allowing him to service all your equipment, and as you have just

(Testimony of D. Ray Hall.)

testified, the reason you are not completing the orders and allowing him his profit on it is because you think you have found someone who will do his work better, is that not true?

A. That is not true. We found someone that is doing the work better, but the reason we did not go ahead with him and furnish the machines is the fact, as I have stated, that he in turn would not do what was reasonably businesslike, in a business-like manner, in getting himself to the point where he could rightfully take care of these. At the same time, all through this period of time, we had more orders in other sections of the country than we could produce. It was up to us to determine as to what section of the country to put those tractors in. It is natural, when we decide what the territory will be to allocate these in, the quality of the representation in the market and things of that kind has to be taken into consideration.

Q. And that is the reason you authorized, told Mr. Heinen, to cancel his contract at the end of the war, in '46?

A. The reason that I authorized or approved, is the fact that Gravely Pacific cancelled his contract—that was because of [315] the fact that he failed, first—he did not have a man available to put on our tractor as he promised verbally to me that he would do. Second, he was not cooperative, in that he didn't attempt to reinstate the orders that he had here, so he could make sure that they were bona fide orders, because our allotment was made on the number of

(Testimony of D. Ray Hall.)

actual orders that a dealer had at that time. And the third thing is the fact that he didn't supply suitable facilities for handling our product, because his facilities which had been redecorated, he sells any number of competing lines, and that was the thing that we did not allow.

Q. And that is the real reason you are not honoring his orders? A. I stated the real reason.

Q. You were not worried about the payment—you know very well that they will pay for them?

A. Yes.

Q. So that that is the real reason?

A. He would have paid for them at that time, I'll wager.

Mr. Carroll: If your Honor please, I ask that the witness' wagers be excluded.

The Witness: Excuse me?

Q. (By Mr. Carroll): Now let me ask you this: You say you had a conversation with Mr. Graves in October of 1945, is that right?

A. That's right. [316]

Q. You discussed all these matters with him?

A. That's right.

Q. Gravely Pacific Company was operating out here?

A. That's right. I discussed those matters with him, both as president of the Gravely Pacific, Incorporated, and before that, of the Gravely Motor Plow & Cultivator Company.

Q. You have two hats, Mr. Hall?

A. I have quite a number.

(Testimony of D. Ray Hall.)

Q. At all events, you did not carry on all these discussions with him at the various times in which this subsidiary of yours was operating?

A. That's right, me and my associates.

Q. Well, I thought you said you were alone at the conversation?

A. I could still talk with him at various times. He talked with Mr. Thomas, Mr. Heinen.

Q. Well, were your conversations with him alone, as you have testified? A. I would assume so.

Q. I think you said that the books of account of the Gravely Company were kept out here in California? A. That's right.

Q. Also the corporate books?

A. That's right.

Q. And they are in charge of Mr. Heinen, I assume?

A. Well, a certain amount of them are in charge of the accountant. [317]

Q. Well, where are the books kept?

A. The books of account—I mean by that, they are kept—the records—they are kept, the corporate records and things of that sort, they are kept at the accountant's.

Q. The books of account, which are the operating books of the company? A. That's right.

Q. They are in Mr. Heinen's charge, are they not? A. That's right.

Q. You hired Mr. Heinen?

A. That's right.

(Testimony of D. Ray Hall.)

Q. You are in constant corerspondence with him?
A. In constant correspondence?

Q. Yes.

A. I explained before, if you want me to go into it again, I can show you how we handle——

Q. I think you can answer it yes or no. Are you?

A. I am not in constant correspondence.

Q. Are you in regular correspondence with Mr. Heinen about the affairs of your company?

A. I get letters from Mr. Heinen about that, and at the same time, he sends weekly and monthly regular reports to Mr. Ed Heinen.

Q. Now, are you not the president of some of your other subsidiary companies, Mr. Hall? [318]

A. That's right.

Q. And how many of the others are you president of?

A. There is twenty-one, I believe; I mean, twenty-one altogether. That would make twenty others.

Q. So you are president of the parent company and you are president of each of the subsidiaries?

A. That's right.

Q. And the other officers of Gravely Pacific, I think you said, were Sybil Hall?

A. That's right.

Q. She is your wife? A. That's right.

Q. And the other officers of this subsidiary corporation are officers of the parent corporation, the Gravely Motor Plow & Cultivator Company?

A. I testified on that yesterday. I don't recollect

(Testimony of D. Ray Hall.)

exactly as to it—whatever my testimony showed.

Q. Well, Mr. Thomas holds office in both companies?
A. Yes.

Q. The secretary of the parent company is also secretary—he has a corresponding office in the subsidiary, does he not?

A. No, not by any way, shape or form.

Q. Well, what is his office?

A. Did I testify yesterday that Mr. H. E. Thompson was secretary of the Gravelly Pacific? [319]

Q. All right, what is Mr. Thomas' position?

A. Mr. Thompson.

Q. Mr. Thomas?

A. Thomas—what is his position? With the——

Q. Gravelly Pacific.

A. With the Gravelly Pacific, I would almost have to get my notes.

Q. You don't remember?

A. I don't remember. Whatever I testified yesterday.

Q. As a matter of fact, you pretty much run all these corporations, don't you?

A. I wouldn't say that at all; I would be pretty well scattered out all over the country if I did it all myself. I am responsible for each one, I am the head of each one as the president, yes.

Q. You are responsible for the subsidiary corporation here, and also for the parent corporation?

A. I am responsible in the point of view that it is a corporation that I am president of. [320]

JOHN WILLIAM HEINEN

recalled as a witness on behalf of defendant; previously sworn.

Examination

By Mr. Tenney:

* * *

We also made it very plain to Mr. Graves that the orders that he contended he had on file as far as we were concerned were no orders whatsoever, that the orders were required from him must be filed with us, that any of this he might have on hand he must screen, he must go out and verify. He must go out either in personal contact, or by telephone, or by letter, and, of course, we were, as I explained to Mr. Graves——

The Court: When did you do that, if you knew that the Carter Company would pay cash on delivery, or cash F.O.B.? Wasn't that a screen order? Didn't you know they would pay when it was delivered?

The Witness: Your Honor, the reason we did that was this: It had been the experience through our own organization that some leads that we had received from the factory which were purported to be actual orders were no orders whatsoever.

The Court: How could you say that and how would you be concerned if you had a certain number of orders and [356] knew, for instance, if you delivered you would get your money. What more were you after than your money?

The Witness: We were concerned with actual orders, not just a vague assurance.

(Testimony of John William Heinen.)

The Court: Didn't you consider that an order from people who had paid consistently when that product was delivered on a freight car? [357]

* * *

Cross-Examination

By Mr. Carroll:

Q. Isn't it a fact you were deliberately using this company during the war to get all the service you could out of them, and then at the end of the war you deliberately terminated them to make the profits on these tractors in your own company?

A. No.

Q. Do you believe Mr. Graves to be an ethical business man?

A. Yes, I do.

Q. And his company one of high business integrity?

A. I do.

Q. You have never known them to have canceled an order which they have placed with your company?

A. No.

Q. You know nothing, certainly, of their canceling an order in their twenty years' business relationship with your factory before you came into the picture?

A. No, I would have no reason to know anything about that.

Q. You have told his Honor you were worried about having a [369] cancellation of orders. Did you ever ship a single one of the 122 tractors that this plaintiff had ordered, to see if they would cancel them?

A. No.

(Testimony of John William Heinen.)

Q. Did you ever offer their 122 tractors to see if they wanted them? A. No.

Q. In fact, you sold them, yourself?

A. We sold tractors retail and wholesale.

Q. This \$13,000 profit that would have gone to the company that represented you all throughout these years and during the war years went to Gravely Pacific, and later on to the dealer that you appointed in 1947 up here?

A. That is a difficult question to answer; but if I say yes it would take many qualifications. [370]

* * *

Mr. Tenney: Defendants rest.

Mr. Carroll: Plaintiff has no further evidence to offer, your Honor.

Mr. Tenney: At this time we would like to renew our motion to quash service of summons on the Gravely Motor Plow & Cultivator Company.

The Court: I think, Counsel, that matter would best be presented on briefs.

[Endorsed]: Filed December 24, 1948. [371]

[Title of Court of Appeals and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal, as designated by the parties, to wit:

Record on Removal

Contains Copies of

Order for Removal

Affidavit of Service

Notice of Filing of Petition and Bond for
Removal to the United States District Court,
Northern District of California, Southern
Division

Notice of Order for Removal

Order for Removal

Petition for Removal of Cause to the United
States District Court, Northern District of
California, Southern Division

Notice of Filing of Petition and Bond for Re-
moval to the United States District Court,
Northern District of California, Southern
Division

Complaint for Damages (Breach of Contract)

Exhibit "A" (Bond)

Record on Removal (Certificate to preceding papers)

Notice of Motion of Defendant Gravely Motor Plow and Cultivator Company, a corporation, to Quash Service of Summons and to Dismiss Suit as to Said Defendant and Affidavit of D. Ray Hall (Exhibit "A") and Affidavit of John W. Heinen (Exhibit "B")

Affidavit of D. E. Graves in Opposition to Motion of Gravely Motor Plow and Cultivator Company to Quash Service of Summons, etc., and Exhibits "A," "B," "C" and "D."

Affidavit of Edwin F. Hiner

Affidavit of D. Ray Hall and attached 6 pages of photostats

Affidavit of D. E. Graves—Supplemental

Affidavit of Pearl G. Smith

Order

Bill of Particulars

Answer of Defendant Gravely-Pacific, Inc.

Dismissal as to Defendant Gravely Motor Plow & Tractor Co., Inc.

Second Amended Answer of Defendant

Decision, Findings of Fact and Conclusions of Law

Judgment

Notice of Motion for a New Trial and to Alter or Amend Judgment

Decision, Findings of Fact and Conclusions of Law

Judgment

Notice of Motion to Alter, Amend and Make Ad-

ditional Findings of Fact and Conclusions of Law and to Amend Judgment Accordingly. Attached is Proposed Additional, Altered and Amended Findings of Fact (unsigned)

Notice of Motion to Amend the Findings of Fact by Making an Additional Finding of Fact, Pursuant to Rule 52(b) of the Federal Rules of Civil Procedure

Motion in Opposition to Plaintiff's Motion to Amend Findings of Fact by Making an Additional Finding of Fact

Plaintiff's Objections to Defendants' Motion to Alter, Amend and Make Additional Findings of Fact and Conclusions of Law and to Amend Judgment Accordingly

Notice of Appeal to Court of Appeals

Cost Bond on Appeal

Appellant's Designation of Record on Appeal

Order on Motion of Defendants to Alter, Amend and Make Additional Findings of Fact and Conclusions of Law and to Amend Judgment Accordingly

Order on Plaintiff's Motion to Amend the Findings of Fact by Making an Additional Finding of Fact

Appellee's Designation of Additional Portions of the Record, Proceedings and Evidence to be Included in the Record on Appeal

Appellee's Amended Designation of Additional Portions of the Record, Proceedings and Evidence to Be Included in the Record on Appeal

Order Extending Time to Docket

Reporter's Transcript for November 22, 1948; November 23, 1948; November 24, 1948, and November 25, 1948

Reporter's Transcript for June 9, 1947

Plaintiff's Exhibits: Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16

Defendants' Exhibits: Nos. A, B, C, D, E, F, G, H, I, J, K, L, M, M¹, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, and NN

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 27th day of January, A. D. 1951.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12844. United States Court of Appeals for the Ninth Circuit. Gravely Motor Plow and Cultivator Company, a Corporation, Appellant, vs. H. V. Carter Co., Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed January 29, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12844

GRAVELY MOTOR PLOW AND CULTIVATOR
COMPANY, a Corporation, et al.,
Appellants.

vs.

H. V. CARTER CO., INC.,
Appellee,

STATEMENT OF POINTS UPON WHICH
DEFENDANT - APPELLANT GRAVELY
MOTOR PLOW AND CULTIVATOR COM-
PANY INTENDS TO RELY ON APPEAL

The points upon which Defendant-Appellant Gravelly Motor Plow and Cultivator Company intends to rely on appeal are as follows:

1. The court erred in its Order dated June 20, 1947, denying defendant's motion to quash service of summons and to dismiss suit as to defendant.
2. The trial court, by its Decision, Findings of Fact and Conclusions of Law, dated March 10, 1950, erred in annulling its previous Judgment entered July 27, 1949, and its Order contained in its Decision, Findings of Fact and Conclusions of Law dated June 22, 1949, wherein it granted defendant's motion to quash service of summons and to dismiss suit as to defendant.
3. The trial court erred in finding a contractual

basis upon which to support its Judgment in favor of plaintiff in the sum of Ten Thousand Nine Hundred Eighty Dollars (\$10,980) for commissions due on the sale of one hundred twenty-two (122) tractors.

Dated: February 8th, 1951.

/s/ SAMUEL S. STEVENS,

HELLER, EHRMAN, WHITE &
McAULIFFE,

Attorneys for Defendant-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 8, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO TRANSFER
OF ORIGINAL EXHIBITS

The parties hereto, being Defendant-Appellant and Plaintiff-Appellee, by their respective counsel hereby stipulate that the original exhibits introduced on the trial of this action and which hereinafter are described with particularity, may be transmitted to the Court of Appeals in lieu of the reproduction of the same exhibits as a part of the printed record on appeal. Said exhibits are described as follows:

Plaintiff's Exhibits

1. Contract between Gravely Motor Plow & Cultivator Co. and H. V. Carter Co.

2. Carbon copy of Purchase Order dated 4/20/45.

3. Letter, 8/23/46, John W. Heinen to H. V. Carter Co.

5. Letter, 4/30/46, Graves to Gravely Co. and reply dated 5/14/46.

6. Decree of Distribution in Estate of H. V. Carter and consent thereto.

7. Letter, Graves to Hall, with list of orders attached.

8. Invoices for work done by builders and material men on Carter premises.

9. Defendant's Bulletin explaining buy-in-advance orders.

10. Document showing request to increase orders.

12. Bulletin directed to All Dealers and Distributors dated 1/1/43.

13. Letter, 6/4/45, Hall to Graves.

15. Letter, 8/25/45, H. V. Carter Co., Inc., to Gravely Motor Plow & Cultivator Co.

16. Letter, 11/18/46, from Gravely Pacific Co.

Defendant's Exhibits

No. P. Two working agreements signed by Hall and Graves.

No. Q. Letter, 4/15/46, Heinen to Graves.

No. R. Letter, 4/18/46, Graves to Heinen.

No. S. Letter, 4/27/46, Heinen to Graves.

No. T. Letter, Graves to Gravely Pacific, Inc., 5/2/46.

No. U. Letter, Heinen to Graves, 5/9/46.

No. V. Letter, Heinen to Graves, 6/1/46.

No. W. Letter, Heinen to Graves, 6/25/46.

No. X. Series of letters from July 3, 1946.

No. Y. Letter, Gravely Pacific to D. E. Graves, 7/11/46.

No. Z. Letter, Heinen to Graves, 7/29/46.

No. AA. Letter, Heinen to Graves, 8/14/46.

No. BB. Letter, D. Ray Hall to Graves, 9/5/46.

No. CC. Gravely Bulletin #21, 2/2/45.

No. DD. Gravely Bulletin, 6/10/45.

No. EE. Form letter, H. V. Carter Co., 1/15/47.

No. FF. Letter and Purchase Order, Graves to Gravely Co. of Dunbar, W. V., 6/28/43, and reply.

No. GG. Letter, Graves to Hall, 10/12/42, and reply, 10/19/42.

No. HH. Order #23795 and correspondence, 1/10/44.

No. II. Letter, Hall to Graves.

No. JJ. Order, 4/30/45, with attached correspondence.

No. KK. Letter, 7/11/46, Heinen to Graves.

No. LL. Letter, 7/29/46, Heinen to Graves.

No. NN. Letter, 7/31/46, Graves to Heinen.

Dated: February 8th, 1951.

/s/ FRANCIS CARROLL,
/s/ DAVID FREIDENRICH,
CARROLL, DAVIS &
FREIDENRICH,
Attorneys for Plaintiff-
Appellee.

/s/ SAMUEL S. STEVENS,
HELLER, EHRMAN, WHITE &
McAULIFFE,
Attorneys for Defendant-
Appellant.

So ordered.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WM. E. ORR,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Endorsed]: Filed February 15, 1951.

